SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 1028.

THE UNITED STATES, PLAINTIFF IN ERROR,

VS.

THE HIAWASSEE LUMBER COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

INDEX.

a UNITED STATES OF AMERICA, *ss:*

At a United States Circuit Court of Appeals for the Fourth Circuit, begun and held at the courthouse, in the city of Richmond, on the first Tuesday in November, being the fifth day of the same month, in the year of our Lord one thousand nine hundred and twelve.

Present: Hon. Nathan Goff, circuit judge; Hon. J. C. Pritchard, circuit judge; Hon. Edmund Waddill, jr., district judge.

Among other were the following proceedings, to wit:

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
THE HIAWASSEE LUMBER COMPANY, DEFENDANT IN ERROR.

In error to the District Court of the United States for the Western District of North Carolina, at Asheville.

Be it remembered that heretofore, to wit, on March 5, 1912, the transcript of the record of the said District Court in the said entitled cause (with the writ of error attached) was transmitted to, and filed in, our said Circuit Court of Appeals here, which is as follows, to wit:

1 *Transcript of record.*

COMPLAINT.

U. S. Circuit Court. Filed Aug. 19, 1910. W. S. Hyams, clerk.

In the Circuit Court of the United States, Western District of North Carolina, at Asheville.

UNITED STATES
vs.
THE HIAWASSEE LUMBER CO.

The plaintiff complains and alleges:

1. That the plaintiff is the owner and entitled to the immediate possession of the following described land situate in Clay County, North Carolina, to wit:

Grand No. three thousand, one hundred and ten, containing five thousand acres, and beginning at a chestnut on the top of Tusquita Ball on the Mason County line, and runs east three hundred and twenty poles to a chestnut on a mountain side, thence south seven hundred poles to a pine, thence west twelve hundred and forty poles to a stake, thence north seven hundred poles to a stake and hickory, then east nine hundred and twenty poles to the beginning.

2. That the defendants are in the wrongful possession thereof, and wrongfully withhold the same from the plaintiff to its great damage.

3. That the Hiawassee Lumber Co. is a corporation duly incorporated and doing business in the county of Clay.

4. That the said land was acquired by the United States by a deed in payment of a debt lawfully due it, and to prevent loss thereon.

Wherefore, plaintiff demands judgment for the possession of the land, and for one thousand dollars damages with costs unjustly expended.

A. E. HOLTON, *U. S. Attorney.*

2 UNITED STATES OF AMERICA,
Western District of North Carolina:

In the Circuit Court, Fourth Circuit, at Asheville.

The President of the United States of America to the marshal of the Western District of North Carolina, greeting:

[2] You are hereby commanded to summon the Hiawassee Lumber Company, citizen and resident of the Western District of North Carolina, to appear before the judges of the Circuit Court of the United States, at the next term of said court to be held for the district aforesaid, at Asheville, on the 1st Monday in Nov. next, then and there to answer the complaint of the United States, the plaintiff herein, which complaint will be filed in said court within the first three days of said term. And let the said defendant take notice that if it fail to answer the said complaint within the time limited by law, the plaintiff will apply to the court for the relief demanded in the complaint of the United States.

Herein fail not, and have you then and there this writ.

Witness the Hon. John M. Harland, Acting Chief Justice of the Spreme Court of the United States, at Asheville, in said district, the first Monday in May, 1910, and in the one hundred and 35th year of the Independence of the United States.

Issued the 19th day of August, 1910.

[SEAL.] W. S. HYAMS, *Clerk.*

To W. E. Logan, Esq., U. S. marshal for the Western District of North Carolina:

[3] I hereby accept service as treasurer of the defendant, Hiawassee Lumber Company, for said company, and request that you make return of the summons accordingly.

This 31st day of August, 1910.

W. A. SAVAGE,
Treasurer of Hiawassee Lumber Co.

U. S. Circuit Court. Filed Oct. 29, 1910. W. S. Hyams, clerk.

3 No. 277.

UNITED STATES OF AMERICA,
Western District of North Carolina:

In the Circuit Court, at Asheville.

THE UNITED STATES
against
THE HIAWASSEE LUMBER CO.

SUMMONS.

Returnable to Nov., 1910, term.

Received Aug. 25, 1910. Executed by reading and delivering a certified copy to J. H. Merrimon, atty., service being accepted by W. A. Savage, treas. of Hiawassee Lumber Co., Aug. 31, 1900.

W. E. LOGAN, *U. S. M.*
By S. WALDROP, *D. M.*

DEFENCE BOND.

U. S. Circuit Court. Filed Nov. 10, 1910. W. S. Hyams, clerk.

[4]
UNITED STATES OF AMERICA:

In the Circuit Court, at Asheville.

UNITED STATES
v.
HIAWASSEE LUMBER COMPANY.

Defence bond.

We, Hiawassee Lumber Company, as principal, and C. W Savage, as surety, acknowledge ourselves indebted unto the United States in the sum of two hundred dollars to be void on condition that the defendant in this action do pay to the plaintiff all such costs and damages as the plaintiff may recover of the defendant in this action; as witness our hands and seals this Nov. 10th, 1910.

HIAWASSEE LUMBER COMPANY, [SEAL.]
By M. W. BELL, *Atty.*
C. W. SAVAGE. [SEAL.]

C. W. Savage, the surety above named, being duly sworn, says that he is worth the sum of two hundred dollars, over and above his debts and liabilities and his exemptions allowed by law.

C. W. SAVAGE.

4 Subscribed and sworn to before me this Nov. 10th, 1910.

W. S. HYAMS, *U. S. Clerk.*
By M. L. ROBISON, *Deputy.*

ANSWER.

U. S. Circuit Court. Filed Nov. 10, 1910. W. S. Hyams, clerk.

In the Circuit Court of the United States, Western District of North Carolina, at Asheville.

[5]

UNITED STATES
vs.
THE HIAWASSEE LUMBER COMPANY.

Answer.

The defendant answering the plaintiff's complaint, says:

1. The allegations contained in paragraph one are not true.

2. Answering the allegations of paragraph two, defendant says that it is in possession of tract No. 6687, by virtue of grant No. 2984, which tract is lapped in part by the land claimed by plaintiff, as plaintiff contends its tract is located, but defendant denies that plaintiff's said tract can be located at all; and defendant denies that its possession of said land is wrongful, but avers that such possession is lawful and right under bona fide title, superior to any title in or claimed by plaintiff.

3. The allegations of paragraph three are admitted, except that defendant says that it is not now engaged in active business in Clay County or elsewhere.

4. The allegations of paragraph four are not true.

And for further defence and counterclaim defendant alleges:

1. That it is the owner in fee simple of said tract No. 6687 by virtue of grant No. 2984, and the plaintiff claims some estate or interest therein, but without right or title, adverse to defendant.

2. That the defendant is in possession of the land mentioned in the preceding paragraph of this counterclaim, and the adverse
5 claim of an interest or estate in the same by plaintiff is wrongful and without any foundation in fact or law and injuries defendant both as to its title and possession.

Therefore defendant demands judgment that it is the owner and in and entitled to the possession of said land, and that plaintiff's claim is wrongful and injurious, and for costs.

DILLARD & BELL,
MERRIMON & MERRIMON,
Attorneys for Defendant.

JURY IMPANNELLED.

[6] Nov. 9, 1911.

No. 277.

UNITED STATES
v.
HIAWASSEE LUMBER COMPANY.

The case is called for hearing. The plaintiff and the defendant announce their readiness for trial; and thereupon the following good

and lawful men, citizens of this district, are tried, chosen, sworn, and empannelled to try the issue joined, to wit:

S. Flem Thomas, Dillard Hoper, L. M. Reeves, B. Dalton, L. D. Gillerpie, L. M. Peek, A. K. Hyder, Jno. T. Moody, Chas. L. Sluder, J. D. Carter, J. A. Penland, and Kerg Angel.

ISSUES.

U. S. Circuit Court. Filed Nov. 17, 1911. W. S. Hyams, clerk.

[7]

In the Circuit Court of the United States, Fourth Circuit, at Asheville.

UNITED STATES
v.
HIAWASSEE LUMBER COMPANY.

Issues.

1. Is the plaintiff the owner of the lands described in the complaint or any part thereof; if so, what part, and entitled to the possession of the same? Answer. No.

2. Is the defendant in the wrongful possession of the said lands or any part thereof? If so, what part? Answer.

6 JUDGMENT.

U. S. Circuit Court. Filed Nov. 18, 1911. W. S. Hyams, clerk.

In the Circuit Court of the United States for the Western District of North Carolina, Fourth Circuit, at Asheville, Nov. term, 1911.

[8]

UNITED STATES
v.
HIAWASSEE LUMBER COMPANY.

Judgment.

This cause coming on to be tried by the court and a jury upon the following issues raised by the pleadings, to wit:

"1. Is the plaintiff the owner of the lands described in the complaint, or any part thereof; if so, what part, and entitled to the possession of the same?

"2. Is the defendant in the wrongful possession of said lands or any part? If so, what part?

And the jury having answered the first issue No, and not having answered the second issue, it is now, on motion of counsel for defendant, considered and adjudged by the court that the plaintiff, United States of America, is not the owner of tract #4500; grant

No. 3110 described in the pleadings and that the defendant, Hiawassee Lumber Company, is the owner of the lands described in the grants enumerated and set out below, to wit:

Grant	#2328,	entry	#2302,	grant	#2325,	entry	#5094,
"	#3008,	"	#6681,	"	#3009,	"	#6682,
"	#3010,	"	#6683,	"	#3011,	"	#6684,
"	#3012,	"	#6685,	"	#3013,	"	#6686,
"	#2984,	"	#6687,	"	#2982,	"	#6656,
"	#2963,	"	#6541,	"	#3002,	"	#6675,
"	#3001,	"	#6674,	"	#2999,	"	#6672,
"	#2965,	"	#6550,	"	#2970,	"	#6657,
"	#3000,	"	#6673,	"	#2998,	"	#6671.

introduced in evidence and admitted on this trial to cover the boundary as claimed by the plaintiff. The costs of this action, so far as the United States is liable to pay costs in litigation of this character, are directed to be taxed against the plaintiff.

JAS. E. BOYD, *U. S. Judge.*

Nov. 18, 1911.

7 ORDER ALLOWING PLAINTIFF UNTIL JAN. 1, 1912, TO PREPARE AND SERVE ITS BILL OF EXCEPTIONS.

U. S. Circuit Court. Filed Dec. 20, 1911. W. S. Hyams, clerk.

[9]

Circuit Court of the United States, Western District of North Carolina, at Asheville.

UNITED STATES
v.
HIAWASSEE LUMBER COMPANY.

In this case, it is by consent ordered that the plaintiff have until January 1, 1912, to prepare and serve its bill of exceptions, and the defendant have twenty days thereafter in which to serve exceptions; that the time given in the former order be so extended.

The clerk will enter this order.

December 19, 1911.

JAS. E. BOYD, *U. S. Judge.*

By consent:

A. E. HOLTON,
U. S. Attorney.
JAS. H. MERRIMON,
M. W. BELL,
Attorney for Defendant.

ORDER THAT THIS CASE BE RETAINED IN THE CONTROL OF THE COURT FOR THE PURPOSE OF SETTLING THE BILL OF EXCEPTIONS.

U. S. District Court. Filed Jan. 16, 1912. J. M. Millikan, clerk, by W. S. Hyams, deputy.

In the District Court of the United States for the Western District of North Carolina.

[10]

UNITED STATES
v.
HIAWASSEE LUMBER COMPANY.

Order.

Ordered, that the above entitled cause be retained in the control of the court for the purpose of settling the bill of exceptions,
8 which has been prepared by the attorneys for the plaintiff and served on the attorneys for the defendant, until the first day of February proximo.

This 16 day of January, 1912.

JAS. E. BOYD, *Judge presiding.*

ORDER EXTENDING TIME TO SETTLE EXCEPTIONS.

U. S. District Court. Filed Feb. 2, 1912. J. M. Millikan, clerk.

In the District Court of the United States, Western District of North Carolina, at Asheville.

[11]

UNITED STATES
vs.
HIAWASSEE LUMBER CO.

In this case it is ordered that the time for settling the exceptions be extended unto the 15th of February, 1912, and that the cause be retained for this purpose.

This February 1, 1912.

JAS. E. BOYD, *U. S. Judge.*

BILL OF EXCEPTIONS.

U. S. District Court. Filed Feb. 15, 1912. J. M. Millikan, clerk.

In the Circuit Court of the United States, Western District of North Carolina, at Asheville.

UNITED STATES
vs.
HIAWASSEE LUMBER CO.

Bill of exceptions.

Be it remembered that at November term, 1911, of the U. S. Circuit Court for the Western District of North Carolina, at Asheville, this

cause came on to be tried before his honor, Jas. E. Boyd, judge, and a jury, upon the following issues submitted:

1. Is the plaintiff the owner of the lands described in the complaint, or any part thereof; if so, what part, and entitled to the possession of the same?

9 2. Is the defendant in the wrongful possession of the said lands or any part thereof? If so, what part?

Exception No. 1.

The plaintiff offered in evidence, as a link in the chain of its title, a deed from E. B. Olmsted and wife, of the city of Washington, District of Columbia, to Levi Stevens for five thousand acres of land, which is in words and figures as follows:

This indenture, made this 7th day of February in the year of our Lord, one thousand eight hundred and sixty-eight, between Edwin B. Olmsted and Adelia J. Olmsted, of the city of Washington, and District of Columbia of the first part, and Levi Stevens, of the city of Washington and Dist. of Columbia, of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of five hundred dollars in lawful money of the United States, to them in hand paid by the said party of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, [13] enfeoffed, released, and conveyed, and do by these presents, grant, bargain, sell, alien, enfeoff, release, and convey unto the said party of the second part, his heirs and assigns forever a certain tract of land lying in Cherokee County, State of North Carolina, in district No. 2, beginning on a chestnut on the top of the Tusquita Ball on the Macon County line and runs E. three hundred and twenty poles to a chestnut on a mountain side, then S. seven hundred poles to a pine, then W. twelve hundred and forty poles to a stake, then N. seven hundred poles to stake and hickory, then E. nine hundred and twenty poles to the beginning, containing five thousand acres more or less.

Together with all the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging, or in any wise appertaining, and all the remainders, reversions, rents, issues, and profits thereof; and all the estate, right, title, interest, claim, and demand, either at law or in equity, or otherwise however, of the said parties of the first part, of, in, to, or out of the said piece or parcel of land and premises.

To have and to hold the said piece or parcel of land and premises and appurtenances, unto the said party of the second part, his heirs and assigns, to his or their sole use, benefit, and behoof forever.

And the said Edwin B. Olmsted and Adilea J. Olmsted for themselves, their heirs, executors, and administrators do hereby covenant, promise, and agree, to and with the said party of the second part, his heirs and assigns, that they, the said parties of the first part and their heirs, shall and will warrant and forever defend the said piece or parcel of land and premises and appurtenances, unto the said party of the second part, his heirs, and assigns, from and against the claims of all persons claiming or to claim the same, or any part thereof.

And further that they, the said parties of the first part, and their heirs, shall and will, at any and all times hereafter, upon the request and at the cost of the said party of the second part, his heirs or assigns, make and execute all such other deed or deeds or other assurance in law, for the more certain and effectual conveyance of the said piece or parcel of land and premises and appurtenances, unto the said party of the second part, his heirs or assigns as the said party of the second part, his heirs, or assigns, or counsel learned in the law shall advise, devise, or require.

In testimony whereof the said parties of the first part have hereunto set their hand and seal on the day and year first hereinbefore written.

EDWIN B. OLMSTED. [SEAL.]
ADELIA J. OLMSTED. [SEAL.]

Signed, sealed, and delivered in the presence of—
EDWIN JAMES.

[14]

DISTRICT OF COLUMBIA,
City & County of Washington, ss:

I, John S. Hollingshead, a commissioner for the State of North Carolina in and for the city and county aforesaid, in the said district, do hereby certify that on the seventh day of February, A. D. 1868, Edwin B. Olmsted and Adelia J. Olmsted, his wife, parties to a certain deed bearing date on the seventh day of February, A. D. 1868, and hereto annexed, personally appeared before me in the district aforesaid, the said Edwin B. Olmsted and Adelia J. Olmsted, being personally well known to me to be the persons who executed the said deed and acknowledged the same to be their act and deed; and the said Adelia J. Olmsted, being by me examined privately and apart from her husband, and having the deed aforesaid fully explained to her, she acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and official seal this seventh day of February, A. D. 1868.

[SEAL.]

JOHN S. HOLLINGSHEAD,
A Commissioner for North Carolina
In and for the District of Columbia.

11 STATE OF NORTH CAROLINA,
Clay County:

I do certify that the foregoing deed was duly registered in the registers office of Clay County on the 23rd day of February, A. D. 1869, Book " A," pages 329 & 330.

WILLIAM MCCONNELL, *Regr.*

STATE OF NORTH CAROLINA,
Clay County:

The foregoing certificate of John S. Hollingshead, commissioner for the State of North Carolina, in the city and county of Washington, District of Columbia, having been exhibited before me with the seal of his office attached, the same is adjudged to be in due form and according to law. Therefore let the foregoing instrument with all the certificates be registered. Given under my hand and seal this 20 day of May, 1896.

T. H. HANCOCK, *C. S. C.*

STATE OF NORTH CAROLINA,
Clay County:

The foregoing deed was filed for registration at 3 o'clock p. m. May 20, 1896, and with certificates was duly registered in office of register of deeds for Clay County, N. C., at 6 o'clock p. m. May 20th, 1896, in record of deeds, Book " H " on pages 61–62 & 63.

G. M. FLEMING,
Register of Deeds, Clay Co., N. C.

Endorsed on the back is the following:

Deed Ed. Olmsted & Adelia J. Olmsted to Levi Stevens D 2 received for record on the 14th day of Dec., A. D. 1868, and recorded in Liber Book K, No. ——, folio 503, one of the land records for Cherokee County in the State of N. Carolina.

DRURY WEEKS,
Register Deeds for said State and County.

[15] [Reads same.]

Mr. BELL. Objection by defendant on the ground that the deed is not probated in the manner provided by law or registered.

12 Mr. HOLTON. I am just going to read that. I will put that all in.

Judge MERRIMON. We say it is not admissible in evidence until it is properly probated and registered.

Mr. HOLTON. It is properly probated. It is only a question of date.

Judge MERRIMON. We ask that his honor pass on it now or reserve it.

The COURT. I am ready to pass upon the questions as they arise. If there is objection to this deed on the ground that it has not been legally registered, of course, that affects its admissibility as testimony. A deed is not admissible in the trial of a case unless it has been registered according to the laws of North Carolina and the original

registration books can be introduced or properly certified copy. If there is defective registration that would affect its admissibility, so I presume that question ought to be passed upon before the paper is admitted.

Mr. HOLTON. I will call your honor's attention to the endorsements on the deed [reads same].

Mr. BELL. It appears here that there is an attempted registration of 1868. We object to that registration on the ground that it was not ordered to record in 1868 by any officer in North Carolina.

Mr. COBLE. They will not deny it is properly registered in 1896, and when we offer it properly registered in 1896 it must be allowed in the court. I suppose the point which is [16] probably to arise in this case is that the defendants in this case derived their title before 1896.

Judge MERRIMON. That is right.

The COURT. If that be true, wouldn't the tender of this deed with admitted legal registration in 1896 render it competent, and the remaining question would be as to its effect.

Judge MERRIMON. We think it important that it be passed upon as to its validity. If they admit it was not properly registered until 1896, that question is eliminated. The question is whether that register was valid or fraud in 1876.

The COURT. Upon which registration are you offering the deed?

13 Mr. HOLTON. Both. If we put in this chain of title properly registered down to the United States and they put nothing in evidence, we would be entitled even if not registered until to-day.

The COURT. If you offer you deed as registered in 1896 properly certified, I will admit it without hesitation, but you are attempting to couple with that an old registration in 1868, and defendant contends that between '68 and '96 they derived their title. The United States claims from Olmsted on a deed executed (registered) 3d day of December, 1896, and from Stevens to the United States. It was along about the same time. The defendant says that after all this was done he procured title either by deed from Olmsted or some judicial proceedings and took title as bona fide purchasers without legal notice of this Olmsted deed, because it wasn't registered.

Judge MERRIMON. That is what they rely on.

The COURT. If the plaintiff would offer that deed as registered in 1896, I would admit it, because that deed is registered and properly certified and ordered to registration, because there is no contention about that. I will admit that, but when coupled with the '68 registration, that is different. The endorsements may be made on the same paper, but the alleged '68 registration is an entirely distinct proceeding.

[17] Judge MERRIMON. And we contend absolutely void.

The COURT. As a deed of '68 as affecting your title cannot be introduced at all, you contend. Let me hear the North Carolina statutes and decisions about that. My recollection is that in order to validate a deed to the extent that it becomes admissible as testimony in the trial in a court in North Carolina that the deed must be either acknowledged or proven before the clerk of the court in a county where the land lies and ordered to registration and registered upon his order and certified that it has been duly acknowledged, and the registrar does nothing more than the mechanical act of putting it in the record. The register has no power to pass on the validity of the certification.

Judge COBLE. I submit that your honor could better decide this after they introduce their evidence and you see the date of registration. It involves the Connor Act.

The COURT. It is the duty of the court to pass on the admissibility of the testimony at the time it is offered.

14 The COURT. Counsel is offering substantially two deeds at one time. That is what Mr. Holton says. He says I am offering a deed registered in 1868, and also one which we say was registered in 1896. Defendant's counsel says this deed registered in 1868 cannot be accepted, as it is not legally registered and is void.

Mr. WILLIAMS. If the plaintiff offers a deed which is properly registered, that would be good as between the grantor and plaintiff, and unless the defendant can set up title superior to the plaintiff the plaintiff must win. The Government's title is good if our deed wasn't registered until yesterday unless he puts in superior title.

The COURT. I will admit the deed registered in 1896.

Mr. HOLTON. We can settle it now or pass on it later.

The COURT. I don't see why I should not pass on the competency now. My opinion is that the registry of 1868 is invalid.

[18] (Exception by plaintiff.)

The COURT. In other words, I do not think it is in shape to be offered under the laws of the State. The law, as argued here, is that it must be legally registered before admitted as testimony. I do not think that deed was at that time.

[19] The court thereupon ruled that the registration of the deed in 1869 as effecting the title could not be introduced and excluded of this registration in 1869, but admitted in evidence the registration of the deed in 1898.

To the ruling of the court excluding the record offered in evidence of the registration of the deed in 1869 the plaintiff excepted; exception allowed, signed, and sealed.

JAS. E. BOYD, *U. S. Judge.*

Bill of exception No. 2.

[20] After the defendant had introduced its evidence, which is set out in the record, the plaintiff again offered record of the registration

of the deed from E. B. Olmsted and wife to Levi Stevens, registered in Clay County February 26, 1869, Book A, pages 229–230, not
15 for the purpose of showing title, but as evidence of notice to the purchasers, simply as a circumstance giving notice. Objection by defendant, objection sustained, evidence excluded; thereupon the plaintiff excepted; exception allowed, signed, and sealed.

JAS. E. BOYD, *U. S. Judge.*

Exception No. 3.

In order to establish the location of the beginning corner called for in the grant and also in the deed offered by plaintiff, the plaintiff offered as a witness one E. T. Shearer, a surveyor who had assisted in making the map used upon the trial, within the red lines of which the plaintiff claimed the land described in the complaint is located and that the red hand on the map points to the chestnut which plaintiff claims was the beginning corner.

The witness testified in part as follows:

Q. When was the first time you ever saw that chestnut stump?

A. The first time I ever saw it was there with Standridge. It has been some seven or eight years ago.

Q. What were you doing there?

A. Me and him and Mr. Kanup was there surveying the land for Mr. F. P. Cover. Standridge was surveying and I was one of the chain carriers.

Q. Did you survey this tract then?

A. No; we were running some lines of some of the small tracts near the corner and we run up there by the corner, and he mentioned it being the corner.

Q. Who was Standridge?

A. He was clerk of the court of our county up to a little before he died—a year or two.

Q. Did he have any other business?

A. He was a surveyor.

[21] Q. How old was he?

A. Something like 50 years old; 40 or 50.

Q. When you were there?

A. Yes.

Q. Had he ever been county surveyor?

A. Yes.

Q. When?

A. He had been surveyor at different times, for several years.

Q. When did he first begin?

A. Back 20 to 25 years ago. He was county surveyor way along back.

Q. Where is he now?

A. Dead. He has been dead possibly a couple of years.

Q. Do you know whether he had any interest in this land or not?

A. He did not.

Q. What did he say about that being the corner, if anything?

16 The plaintiff proposed to show that the surveyor Standridge stated that the chestnut stump was the beginning corner of the Government tract.

(Objection by defendant.)

COURT. When was the survey being made?

A. About 1903 is the best of my recollection.

The court sustained the objection, excluded the testimony; the plaintiff excepted, exception allowed, signed, and sealed.

JAS. E. BOYD, *U. S. Judge.*

Exception No. 4.

[22] The following testimony was offered by the plaintiff and the defendant in the cause:

Offered by the plaintiff:

Grant from the State of North Carolina to E. B. Olmsted, No. 3110, for 5,000 acres of land, dated November 10, 1867, signed by Jonathan Worth, governor, viz:

STATE OF NORTH CAROLINA: No. 3110.

Know ye that we, for and in consideration of the sum of six hundred and twenty-five dollars and —— cents, paid into the treasury by E. B. Olmsted, have given and granted, and by these presents do give and grant, unto E. B. Olmsted a tract of land containing five thousand acres, lying and being in the county of Cherokee, section No. ——, in district No. 2, it being part of the land lately acquired by treaty from the Cherokee Indians, and sold in obedience to an act of the general assembly of this State, bounded as follows, viz: Beginning on a chestnut on the top of the Tusquita Ball, on the Macon County line, and runs E. three hundred and twenty poles to a chestnut on a mountain side; then S. seven hundred poles to a pine; then W. twelve hundred and forty poles to a stake; then N. seven hundred poles to a stake and hickory; then E. nine hundred and twenty poles to the beginning.

Entered Dec. 30th, 1854.

as by the plat hereto annexed doth appear, together with all woods, waters, mines, minerals, hereditaments, and appurtenances

17 to the said land belonging or appearing, to hold to the said E. B. Olmsted, his heirs and assigns, forever; yielding and paying to us such sums of money yearly or otherwise as our general assembly from time to time may direct: Provided always, That the said grantee shall cause this grant to be registered in the register's office of our said county of Cherokee within twelve months from the date hereof, otherwise [23] the same shall be void.

In testimony whereof, we have caused these our letters to be made patent and our great seal to be hereunto affixed.

Witness Jonathan Worth, Esq., our governor, captain general and commander in chief, at Raleigh, the 10 day of November, in the ninety-second year of our independence, and in the year of our Lord one thousand eight hundred and sixty-seven.

JONATHAN WORTH, *Governor.*

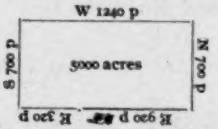
By command:

R. W. BEST,
Secretary of State.

Attached to said grant is the following:

[L. S.]

Scale 400 poles per inch.



STATE OF N. CAROLINA,
Cherokee (now Clay) County:

By virtue of a warrant No. 4500 I have surveyed for Arthur M. Dyche a tract of land in district No. 2, beginning on a chestnut on the top of the Tusquita Ball on the Macon County line and runs E. three hundred & twenty poles to a chestnut on a mountain side, then S. seven hundred poles to a pine, then W. twelve hundred & forty poles to a stake, then N. seven hundred poles to a stake and hickory, then E. nine hundred and twenty poles to the beginning, containing five thousand acres more or less. Surveyed Feb. 20th, 1854.

C. B. THOS. HOLLAND, PERCY, J. B. BARKER, *C. S.*
J. C. HUSKINS. M. Duplicate
By J. H. HENNESA, *C. S.*

18 On the back of same are the following endorsements:

No. 3110.

E. B. Olmsted.
5,000 acres Cherokee County.
Recorded in the secretary's office.

R. W. BEST, *Secretary.*

There is deposited in this office the proper authority from Arthur M. Dyche to issue this deed to E. B. Olmsteas.

R. W. BEST,
Secy. of State.

The within grant came to hand the 9th day of November, 1868, and was duly registered in the register's office of Cherokee County, N. Carolina, in Book K, and page 561.

DEURY WEEKS,
R. Deeds, C. Cty., N. C.

[24] Mr. HOLTON. The first piece of evidence we offer is a grant from the State of North Carolina to E. B. Olmsted, No. 3110, to 5,000 acres of land. I will read the grant. This is grant 3110 for 5,000 acres of land issued to E. M. Olmsted, November 10, 1867, from Jonathan Worth, governor, registered in Clay County on the 9th day of November, 1868.

Mr. BELL. We would like to inquire if the certificate of survey is assumed to be entered along with the balance of the paper?

Mr. HOLTON. I have no objection.

The COURT. He offers the grant. I suppose anything attached to it is offered.

Mr. HOLTON. That may be considered in.

[25] Plaintiff then offered certified copy from the office of the secretary of state of the warrant of survey of tract No. 4500, viz:

"STATE OF NORTH CAROLINA,
"*Cherokee County:* No. 4500.

"Entry office of claims for lands in the county of Cherokee.

"*To the surveyor of said county, greeting:*

"You are hereby directed and required as soon as may be to lay off and survey for Arthur M. Dyche five thousand acres of land
19 in said county in district No. 2 on the watters of Tusquita and Fairers Creek beginning on a chestnut tree on the top of the Tusquitti Ball Mountain on the Macon County line and is to run E. 320 poles to a chestnut on a mountain side then S. 700 poles to a pine on the warters of Tooney's Creek and various courses for compliment.

"Entered the 30 day of December, 1854, observing the directions of the act of assembly in such case made and provided for running out lands, two just and fair plans of such survey with a proper certificate annexed to each, you are to make out to be transmitted with this warrant, to the secretary's of [26] fice. Given under my hand and seal at office, the 8 day of April, 1867.

"DANIEL GREEN, *E. T.* [SEAL.]"

STATE OF NORTH CAROLINA,
OFFICE OF SECRETARY OF STATE,
Raleigh, November 3rd, 1911.

I, J. Bryan Grimes, secretary of state of the State of North Carolina, do hereby certify the foregoing and attached (one (1) sheet) to be a true copy from the records of this office.

In witness whereof, I have hereunto set my hand and affixed my official seal.

Done in office at Raleigh this 3rd day of November, in the year of our Lord 1911.

[SEAL.]

J. BRYAN GRIMES,
Secretary of State.

Plaintiff offered in evidence entry taker's book with following entries thereon, viz.:

15. (*Entry taker's book.*)

[27]
A. M. Dyck, No. 4500 enters 5,000 acres Jan. 1/55.

STATE OF NORTH CAROLINA,
Cherokee County:

Arthur M. Dyck enters and locates five thousand acres of land in said county of dist. No. 2, on the waters of Tusquitta and Fires Creek, beginning on a chestnut tree on the top of the Tusquitta Ball Mt. on the Macon County line and is to run east three hundred and twenty poles to a chestnut on a mt. side; then south seven hundred poles to a pine on the waters of Tooney's Creek and various courses for complement. Dec. 30, 1854.

ARTHUR M. DYCK.

Issued Feb. 12, 1855.
Duplicate issued to ———

20 [28] Plaintiff then offered in evidence deed from E. B. Olmsted and wife, Adelia J. Olmsted, of the city of Washington, D. C., to Levi Stevens, of Washington, D. C., describing the same boundaries, dated February 7, 1868, and registered in Clay County on the 20th day of May, 1896, a copy of which, together with the certificates of probate and registration, are set forth in exception No. 1.

[29] Plaintiff then offered in evidence deed from Levi Stevens and wife to the United States, dated March 15, 1868, purporting to convey 32,483 acres of land, giving descriptions of 45 different tracts, including a tract of 5,000 acres, the formal parts of which and the description of the 5,000 acres of land is as follows:

This indenture made this fifteenth day of March, in the year of our Lord one thousand eight hundred and sixty-nine, between Levi Stevens and Malvina F. Stevens, his wife, of Washington, D. C., party of the first part, and the United States of America, party of the second part;

Witnesseth, that the said party of the first part for and in consideration of the sum of forty thousand and five hundred dollars current money of the United States to them in hand paid at and before the sealing and delivery of these presents, by the said party of the second part, the receipt of which is hereby acknowledged, have granted, bargained, and sold, enfeoffed, conveyed, released, and confirmed, and by these presents do grant, bargain, and sell, enfeoff, convey, release, and confirm unto the said party of the second part, their heirs and assigns, forever all those pieces, parcels, or tracts of land lying and situate in the county of Cherokee and State of North Carolina, being the same land conveyed by the State of North Carolina

by grant from said State to E. B. Olmsted, under date of November 10th, 1867, and described as follows, to wit:

* * * * * * *

Grant No. three thousand one hundred and ten, containing five thousand acres and beginning on a chestnut on the top of Tusquita Ball on the Macon County line and runs east three hundred and twenty poles to a chestnut on a mountain side, then south seven hundred poles to a pine, then west twelve hundred and forty poles to a stake, then north seven hundred poles to a stake and hickory, then east nine hundred and twenty poles to the beginning. The whole quantity of said lands hereby granted being thirty-two thousand four hundred and eighty-three acres, together with all the buildings, improvements, rights, privileges, appurtenances, and other hereditaments to the same belonging or in any manner appertaining,
21 and the remainders, reversions, rents, issues, and profits thereof and all the right, title, interest, and estate of them, the said Levi Stevens and Malvina F. Stevens, his wife, party of the first part, in and to the same, to have and to hold, the said lands and premises with the appurtenances unto the said United States, party of the second part, its successors and assigns forever, to them, and their sole use, benefit, and behoof. And the said Levi Stevens and Malvina F. Stevens, his wife, for their heirs, executors, and administrators, by these presents covenant, promise, and agree to and with the said United States and its assigns in manner following, to wit: That the said Levi Stevens and Stevens, his wife, and their heirs shall and will warrant and forever defend the said lands and premises with the appurtenances hereby bargained and sold unto it, the said United States, and its assigns from and against him, the said Levi Stevens, his heirs and assigns, and all persons claiming or who may claim by, under, or through him, them, or any of them.

And further that the said Levi Stevens and Malvina F. Stevens, his wife, and their heirs shall and will at any and all times hereafter, at the request and cost of the said United States and its assigns, make and execute any and every other deed of assurance in law for the more sure and effectual con- [30] veyance of the said lands and premises, with the appurtenances, to the said United States and its assigns that the said United States or its assigns, or their counsel learned in the law, shall or may devise, advise, or require.

In testimony whereof the said Levi Stevens and Malvina F. Stevens, his wife, hath hereunto set their hands and affixed their seals the day and year first hereinbefore written.

LEVI STEVENS. [L. S.]
MALVINA F. STEVENS. [L. S.]

Signed in our presence, the words "containing six hundred forty acres,' in the sixth line from the top of the fifteenth page having first been inserted.

E. DUDLEY.
CHARLES CHAUNCEY.

(Three U. S. internal-revenue stamps.)

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

I, Charles Chauncey, a commissioner appointed by the State of North Carolina in and for the State of Pennsylvania, do hereby
22 certify that on the fifteenth day of March, in the year of our Lord one thousand eight hundred and sixty-nine, personally appeared before me, in said city of Philadelphia, the said Levi Stevens, whose name is signed to the above writing, and acknowledged the same to be his act and deed.

In witness whereof I have hereunto set my hand and official seal this fifteenth day of March, 1869.

[L. S.] CHARLES CHAUNCEY.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

I, Charles Chauncey, a commissioner appointed by the State of North Carolina in and for the State of Pennsylvania, do certify that Malvina F. Stevens, the wife of Levi Stevens, whose names are signed to the writing above, bearing date on the fifteenth day of March, 1869, personally appeared before me in the said city, and being by me examined privately and apart from her said husband and having the writing aforesaid fully explained to her, she, the said Stevens, acknowledged the said writing to be her act, and declared that she had willingly executed the same and does not wish to retract it.

In witness whereof I have hereunto set my hand and official seal this fifteenth day of March, 1869.

[L. S.] CHARLES CHAUNCEY.

The foregoing deed and certificates was registered in the register book of Cherokee County, North Carolina, in Book (M), page 341 to 355, this August 4th, 1871.

I. H. HENNESA, *Register of Deeds.*

NORTH CAROLINA, *Graham County:*

The foregoing instruments and certificates of Charles Chauncey, a commissioner of deeds for North Carolina in and for the State of Pennsylvania, with his official seal attached, having been exhibited before me, the same is adjudged to be in due form and according to law. Therefore let the said instrument and all the certificates be registered. Witness my hand and seal this May 14th, 1896.

[L. S.] T. A. CARPENTER,
Clerk Superior Court.

23 NORTH CAROLINA, *Graham County:*

The w'thin deed was this day duly registered in the register's office of Graham County, N. C., in Book "H" on pages 282 to 288. This May 14th, 1896.

W. F. MAUNEY, *Register of Deeds.*

NORTH CAROLINA, *Clay County:*

[31] The foregoing instrument and certificate of T. A. Carpenter, clerk of the Superior Court for Graham County, N. C., with his official seal attached having been exhibited before me the same is adjudged to be in due form and according to law. Therefore let the instrument and certificates be registered. Witness my hand and seal this 20th day of May, 1896.

T. H. HANCOCK, *C. S. C.*

STATE OF NORTH CAROLINA, *Clay County:*

The foregoing deed was filed for registration at 4 o'clock p. m. May 20, 1896, and with certificates was duly registered in office register of deeds for Clay County, N. C., at 1 o'clock p. m. May 22nd, 1896, in record of deeds Book "H," on pages 67 to 76.

G. H. FLEMING,
Register of Deeds, Clay Co., N. C.

On the back of which is this endorsement:

Levi Stevens and his wife, Melvina F. Stevens, to the United States. Deed.

[32] Mr. HOLTON. This deed from Levi Stevens and wife to the United States dated 15th day of March, 1869. After reciting the number of tracts of land, grants, entries, etc., the land described in this grant No. 3110, which is the same description in the complaint, the same in this deed from Olmsted to Stevens, containing 5,000 acres beginning on a chestnut on the top of "Tusquitte Bald" then there is the certificate and registry.

Mr. BELL. There is a registry there in Clay?

24 Mr. HOLTON. It wasn't registered in Clay until 1896.

Mr. BELL. I ask lest the point arise later.

Mr. BOLTON. It is registered in Clay in 1896, May 26. That is probated and ordered by the court, the clerk of the court.

Mr. BELL. You don't make any claim as to the Cherokee registration in 1871?

Mr. HOLTON. Not as passing any title.

Mr. BELL. Or giving you any claim?

Mr. HOLTON. It may give notice.

Mr. BELL. We make the same objection to the deed.

Mr. HOLTON. I have not offered it for that purpose. We later on, if the evidence comes that we anticipate, propose to renew the offer of this testimony with a view not of showing that title passed by registration but under the Connor Act.

[33] The plaintiff offered in evidence certified copies of the transcript of record from the Supreme Court of the District of Columbia showing that proceedings were instituted in the Supreme Court of the District of Columbia on November 27, 1868, wherein the United States was plaintiff and Edwin B. Olmsted, John F. Coyle, and William R. Snow were defendants, for the recovery of $83,905.80 alleged to have been misappropriated by the said Olmsted while disbursing

clerk in the Post Office Department, which office he had recently held, and against the other defendants as sureties on the bond of the said Olmsted, in the sum of twenty thousand dollars; that while this suit was pending and before the execution of the deed from Levi Stevens to the United States a final settlement was made between the Secretary of the Treasury, the Solicitor of the Treasury, and E. B. Olmsted, in which it was ascertained that the said Olmsted owed the United States the sum of $48,000; that he was insolvent without any means whatever to repay the United States; that after considerable negotiations between the said parties, in order to save harmless the United States, the Secretary of the Treasury accepted from the said Levi Stevens, to be credited on the said amount due from the said Olmsted, $40,500 as the consideration for 32,483 acres of land described and referred to in the deed from Levi Stevens to the United States offered in evidence.

25 The plaintiff also offered in evidence certified copies of letters passed between the Secretary of the Treasury, the Solicitor of the Treasury, and the attorneys of record for E. B. Olmsted negotiating this settlement and fully setting forth the reasons for the United States accepting the same, to the effect that Olmsted and his sureties were insolvent and that it was to the interest of the United States to accept this land at the price agreed upon, which was then ascertained to be a reasonable price therefor.

It was admitted by defendant that from the facts offered in evidence the United States had the right to acquire and hold this land.

[34] Plaintiff offered map or plat of the land of a survey made by E. T. Shearer and H. S. Hayes under order of court, marked "Exhibit A," hereto attached.

Plaintiff offered in evidence sixteen grants issued by the State of North Carolina to E. B. Olmsted, each for 640 acres, dated November 10, 1867, as follows:

Grant.	Entry.
3008	6681
3009	6682
3010	6683
3011	6684
3012	6685
3013	6686
2984	6687
2982	6656
2998	6671
3000	6673
2970	6557
2965	6550
2999	6672
3001	6674
3002	6675
2963	6541

It is admitted that the descriptions in these grants embrace the lands described on the map as indicated by the entry numbers and grants marked and described thereon.

[35] The defendant claims to have derived its title through these same entries which were made in April, 1859, surveyed in May and June, 1859, and grants issued on November 10, 1867, by grants of smaller number than 3110.

(Map here. Omitted by direction of United States attorney.)

26 [37] Plaintiff offered as a witness one E. T. Shearer, a surveyor, who stated that he, Mr. Hays, made the map offered in evidence; that the red lines thereon indicate the land surveyed as the land described in the plaintiff's complaint, the grant from the State to E. B. Olmsted, 3110, the description of the land in the deed from Olmsted to Levi Stevens, and from Levi Stevens to the United States; that the chestnut corner indicated on the map by the red hand is indicated as the beginning corner of the land described in these conveyances and that the lines thereon run by the surveyors are indicated by the figures in poles on the several lines; that the chestnut was located on Tusquita Bald on the Macon County line, as indicated by the marked line.

Plaintiff also introduced J. C. Huskins, who testified that in 1867 he, together with John Hennessee, surveyor, West Piercy, and Tom Holland, surveyed the 5,000 acres of land at the instance of Olmsted or Dyche, and that they begun at the chestnut indicated by the red hand, on the Tusquita Bald, in the Macon County line, and run the red lines indicated on the map; that witness and Tom Holland were the chain carriers.

Plaintiff also introduced Tom Holland, who testified that in September, 1867, he, together with J. C. Huskins, carried the chain for the survey referred to by witness Huskins, and that they begun on the chestnut indicated by the red hand, on the Tusquita Bald in the Macon County line.

Other testimony was introduced both by the plaintiff and the defendant upon the question of location, and it was admitted that there was evidence sufficient to go to the jury as to the location.

Defendant's evidence.

[38] Mr. BELL. We introduce first grant with certificate attached No. 2325 for entry No. 5094, grant dated 20th day of December, 1860, registered in Clay County, 26th day of June, 1862, Book "A," page 77, re-registered December 17th, 1906, Book "m," page 476.

Mr. HOLTON. We admit that covers 5094. How many acres in that, Mr. Bell?

Mr. BELL. 50 acres. This was entered on the 14th day of May, 1856.

(Objection by plaintiff.)

27 Judge MERRIMON. That was surveyed before Clay County was created.

Mr. HOLTON. Entered in 1856 and grant is 1860, four years thereafter, and not within the time prescribed by law.

Mr. BELL. I will introduce certified copy of the entry No. 5094 for which that grant issued 29th of April, 1856, and survey made 14th of May thereafter. I believe you admit the location.

Mr. HOLTON. I admit that with reference to that little corner in there, 40 acres.

Mr. BELL. We introduce entry 2302, dated 1st day of September, 1853, by T. B. Bristol, grant 2328, for entry 2302, dated December 20th, 1860, and registered in Clay County, June 12th, 1862, Book "A" reregistered December 17, 1906, Book "M," page 80 et seq.

Mr. HOLTON. We object on the ground that it is entered in 1853 and surveyed in 1855.

Judge MERRIMON. I take it that all these objections are rather to the effect of the paper than the admissability as evidence.

Mr. HOLTON. If it is not issued in accordance with the law, it will not be competent.

The COURT. It is admissable as evidence if it has been put [39] to record, but as to whether it proves is another thing. The effect as a muniment of title is another think from admissability as evidence in a case. I admit your grant, but I didn't say it passed title. The objection is more to the effect, I suppose, than to the admisability of the paper.

Complaint in case G. W. Swepson vs. E. B. Olmstead.

[40] Defendants then introduce the following certified copy of transcript from Macon court, viz:

28 Spring term, 1882.

SUPERIOR COURT,
Macon County:

G. W. SWEPSON, PLTFF.,
against
E. B. OLMSTEAD, DEFT.

Complaint.

The plaintiff alleges:

1. That on the 1st day of October, 1867, he, the plaintiff, was seized of the equitable title to the lands hereinafter described, and the legal title was in the State of North Carolina, although plaintiff had paid the State of North Carolina the purchase money for the same; and that the defendant contracted with the plaintiff for all of said lands amounting to eighty-nine thousand five hundred and thirty-two (89,532) thousand acres, and plaintiff assigned his equitable title to the said defendant to enable said defendant to obtain the State grants in his, defendant's, name, with the expressed and distinct understand-

ing that defendant was to recover to the plaintiff such number of acres of land that he did not pay for.

II. That the defendant failed to pay for all of such lands, except thirty-two thousand (32,000) acres, for the said number of thirty-two thousand acres of land he did pay for, which are situated in Stecoah Township, in the county of Graham, No. Ca., and which were conveyed (as plaintiff is informed) by defendant to the Government of the United States.

III. That the defendant advanced to the plaintiff the sum of five hundred dollars, which sum was to be paid out of the [41] sales of these lands when sold by plaintiff; and that defendant, in pursuance of the aforesaid agreement, obtained in his own name State grants for the said lands which are described in Exhibit "A" and hereto attached and made part of this complaint.

Wherefore, plaintiff demands judgment.

1st. That plaintiff is declared a trustee of said lands for the benefit of plaintiff, and that he be compelled, either in his own proper person or by a commissioner appointed on the part of the court to sell said lands, and make title to the purchaser or purchasers, and out of the proceeds of said sale, the defendant to be paid the sum of five hundred dollars due him by plaintiff and also the costs of this action, and all other costs and expenses growing out of this action or incurred by the same.

K. ELIAS, *Attorney for Plaintiff.*

29 [42] *Decree in G. W. Swepson vs. E. B. Olmstead from Macon County.*

Spring term, 1882.

SUPERIOR COURT, *Macon County:*

G. W. SWEPSON, PLAINTIFF,
against
E. B. OLMSTEAD, DEFENDANT.

Decree.

This cause coming on to be heard upon the complaint, proofs, exhibits, and verdict of the jury and it appearing to the satisfaction of the court that a writ of summons has been duly executed on the defendant and there is no defence made to this action, it is therefore:

Ordered, adjudged, and decreed by the court that the plaintiff have and recover judgment of the defendant the lands mentioned in his complaint and marked "Exhibit A" amounting to eighty-nine five hundred and thirty-two thousand acres of land.

It is further adjudged and decreed by the court that the defendant is trustee of the plaintiff and holds the aforesaid eighty-nine five

hundred and thirty-two (88,532) thousand acres of land as trustee of plaintiff for plaintiff's benefit, subject, however, that is to say, to the payment of five hundred dollars, due the defendant by plaintiff and the said five hundred dollars being a lien on the said eighty-nine five hundred and thirty-two (89,532) thousand acres of land, and it is further adjudged and decreed by the court that the eighty-nine five hundred and thirty-two (89,532) thousand acres of land be [43] sold at private or public sale, to pay the said amount of five hundred dollars due the defendant and the costs of this action, and the compensation which may be allowed the commissioner for executing the terms of this decree. And for the purpose of executing and carrying out the provisions of this decree K. Elias, Esq., is hereby appointed commissioner, whose duty it shall be to sell all of the aforesaid lands, and execute deed or deeds to the purchaser or purchasers upon the payment of the purchase money, and out of the money realized from said sale to first pay the said sum of five hundred dollars to the defendant E. B. Olmstead, then the costs of this action, then to retain the allowance made to him by the court as compensation for services rendered in the premises as commissioner and the residue to pay to the plaintiff herein.

H. A. GILLIAM,
Judge of the 2nd Jud. Dist. and presiding over the Courts of the 9th Jud. Dist. of North Carolina.

30 *Report of sale by commissioner.*

[44]

Fall term, 1882.

SUPERIOR COURT, *Macon County:*

G. W. SWEPSON, PLFF.,
vs.
E. B. OLMSTEAD, DEFT.

REPORT OF SALE BY COMMISSIONER.

By virtue of a decree of the Superior Court rendered in this cause, appointing the undersigned commissioner to make sale of the lands mentioned and referred to in said decree, the undersigned respectfully report to the honorable court that he has made sale of all of the lands mentioned and referred to in said decree to A. Rosenthal, and the sum of forty thousand dollars, and that he had paid the five hundred dollars, due the said defendant, E. B. Olmstead, and is ready, upon the confirmation of this sale, to pay it into court and also has the money to pay the costs of this action, and the residue of the money is ready to be paid upon the execution and delivery of the deed of conveyance to the purchasers aforesaid.

K. ELIAS, *Commissioner.*

Final decree.

[45]

Fall term, 1882.

SUPERIOR COURT, *Macon County:*

G. W. SWEPSON, PLFF.,
against
E. B. OLMSTEAD, DEFT.

Final decree.

This cause coming on to be heard upon the report of K. Elias, Esqr., the commissioner appointed to make sale of lands in this cause for a further and final decree and it appearing to the satisfaction of the court that the sale ought to be confirmed, and that the five hundred dollars due the defendant is ready *is ready* to be paid to the said defendant or into court for his benefit, it is therefore,

Ordered and decreed by the court that the sale made by the commissioner, aforesaid, be, and is hereby, in all things confirmed, and that the said commissioner execute to the purchaser, A. Rosenthal, a deed of conveyance for the lands aforesaid, and upon the payment of the residue of the money due the plaintiff out of the sale
31 of the said lands that he retain five per centum of the amount as compensation and the balance to pay to the plaintiff herein.

JAS. E. SHEPHERD, *Judge Presiding.*

STATE OF NORTH CAROLINA,
Macon County:

I, W. N. Allman, clerk of the Superior Court of Macon County, North Carolina, do hereby certify that the foregoing is a true and perfect copy of the papers in this cause, to wit, G. W. Swepson vs. E. B. Olmsted.

Given under my hand and seal of office this the 25th day of October, 1882.

[SEAL.]

W. N. ALLMAN,
Clerk of Superior Court, Macon County, No. Ca.

[46] To the introduction of this record the plaintiff in apt time objected upon the ground that it does not show that a summons was served on the defendant, nor does it show that there is any description of land therein given; its only reference to description is to Exhibit A, and Exhibit A is not attached nor introduced in evidence, and there is no evidence that it ever existed.

The court admitted the evidence, stating that its effect as to whether it passed title would be passed upon later, but being a record of the proceedings in a court of North Carolina, properly certified, is admissible as evidence, and overruled the objection of the plaintiff, to which plaintiff excepted.

[47] Defendant introduces deed from Kope Elias, commissioner, to A. Rosenthal, dated October 28, 1882, registered in Clay County on October 17, 1890, Book "F," page 282, recitals of which are as follows:

"By virtue of the decree of the Superior Court of Macon County and in the State of North Carolina, rendered at the Superior Court of said county at spring term, 1882, being the 23rd day of May, A. D. 1882, appointing, authorizing, and empowering K. Elias, commissioner, to make sale of the lands hereinafer mentioned and described; and whereas, by virtue of the authority and power vested in me as commissioner aforesaid, I did sell and make a report thereof at the Superior Court of said county at its fall term, 1882, being the 25th day of October, 1882, which report was in all things confirmed, at which time a further and final decree was made by the court authorizing and directing me as commissioner aforesaid to execute and deliver a deed of conveyance to A. Rosenthal, of the county of Alamance and State of North Carolina, the purchaser.

32 "Therefore this indenture, made this 28th day of October, A. D. 1882, between K. Elias, commissioner aforesaid of the county of Macon and State of North Carolina, of the first part, and A. Rosenthal, of the county of Alamance, State of North Carolina, of the second part, witnesseth:

"That the said party of the first part, for and in consideration of the sum of forty thousand dollars to me in hand paid, the receipt [48] whereof is hereby acknowledged, has by these presents given, granted, bargained, and sold, and does hereby give, grant, bargain, sell, and convey to the said A. Rosenthal, party of the second part, and his heirs and assigns, the following-described lands, to wit:

"Situate in the counties of Cherokee, Macon, Swain, and Jackson, in the State of North Carolina, bounded and described as follows:

"(Description containing about ninety (90) grants severally described by metes and bounds, including grants Nos. 3008, 3009, 3010, 3011, 3012, 3013, 2984, 2982, 2963, 3002, 3001, 2999, 2965, 2970, 3000, 2998.)"

This is the same as the grants introduced by plaintiffs bearing these numbers, and embrace the lands in dispute.

[49] To the introduction of this deed the plaintiff excepted in apt time upon the ground that there was no authority contained in the order of court to execute a deed to the lands described in this deed, there being not sufficient description of the land in the pleadings.

The court admitted the evidence, stating that its effect as to whether it passed title would be passed upon later, but being a record properly certified, is admissible as evidence, and overruled the objection of the plaintiff, to which plaintiff excepted.

[50] Defendant introduced quitclaim deed from E. B. Olmstead and wife to A. Rosenthal, dated October 31, 1882, registered in Clay County, N. C., Nov. 12, 1906, Book "M," page 337, in consideration of $500.00, quitclaiming all interest of E. B. Olmstead and wife to

all lands described in the deed from K. Elias, commissioner, to Rosenthal.

Defendant introduces deed from A. Rosenthal and wife to J. H. McAdden, trustee, which is as follows:

STATE OF NORTH CAROLINA,
Alamance County:

[51] Whereas Kope Elias, commissioner of the Superior Court of Macon County, North Carolina, did convey to A. Ros-
33 enthal, of Alamance County, aforesaid, by deed dated October 28, 1882, certain tracts of land in the said deed fully described (to which reference is made for a more particular description), containing in the aggregate about 89,532 acres, lying and being in the counties of Cherokee, Macon, Jackson, and Swain Counties, aforesaid State, the said lands being known as the Olmstead grants; and whereas, by deed dated October 31st, 1882, E. B. Olmstead and wife, of the State of New York, did release and quitclaim to A. Rosenthal the lands in the counties aforesaid known as the Olmstead grants, which are fully described in his deed aforesaid, dated October 31st, 1882, to which reference is made.

Now, in order to carry out the purposes for which said deeds were made, we, A. Rosenthal and wife, Henrietta Rosenthal, of Alamance County, North Carolina, for certain good and valuable considerations, do hereby convey, release, grant, confirm, and quitclaim to John H. McAden and his heirs all the lands which were conveyed to said A. Rosenthal by Kope Elias, commissioner, and E. B. Olmstead by their aforesaid deeds, and which are therein fully described, to have and to hold the premises, with all the rights, privileges, and appurtenances thereto in any way belonging to him, the said John H. McAden and his heirs in trust for the heirs and devisees of Rufus Z. McAden, late of Mecklenburg County, State aforesaid, and upon the same conditions and limitations as are by [52] the will of Rufus Z. McAden put upon other lands, with full power to sell and dispose of said lands for the benefit of the estate of said R. Z. McAden, and to convey the same in fee simple just as he is by said will authorized to do as to the other lands of said R. Z. McAden. Henrietta Rosenthal, wife of A. Rosenthal, joins her husband in the execution of this deed in token of her assent thereto, and of her renunciation of all claims of dower or homestead therein.

In witness whereof, A. Rosenthal and wife have hereto set their hands and seals this 21st day of May, 1889.

A. ROSENTHAL. [SEAL.]
HENRIETTA ROSENTHAL. [SEAL.]

Witness:
E. M. COOK.

Registered on proper probates.

This deed was registered in Clay County, May 12, 1906, Book "M," page 114.

34 Plaintiff introduces last will and testament of George W. Swepson, a copy of which is set out on the Alamance proceedings.

Defendant introduces record of the Superior Court of Alamance County in words and figures as follows:

SUPERIOR COURT, *Alamance County:*

In the matter of the petition of Mrs. Virginia B. Swepson, executrix and sole devisee and legatee of George W. Swepson, dec'd.

Special proceeding for authority to sell land.

[53] I. The petition of Virginia B. Swepson respectfully showeth to the court that the late George W. Swepson died in the county of Wake, in the State of North Carolina, on the 7th day of March, 1883; that before his death he made and published his last will and testament which, on the 12th day of March, 1883, was duly admitted to probate in the said county of Wake, where he was domiciled.

II. That by his said will he devised and bequeathed all of his property and estate, real, personal, and mixed, in fee simple and absolutely to your petitioner, Virginia B. Swepson, who is his widow, and nominated and constituted her sole executrix of his said will.

III. That your petitioner, after proving the said will, was duly qualified as executrix thereof and letters testamentary were duly issued to her according to law.

IV. That the amount of debts outstanding against the estate of the said testator, as nearly as she can ascertain, is about four hundred thousand dollars.

V. The value of the personal estate of her said testator was very inconsiderable, to wit: About the amount of six thousand dollars, consisting mainly of notes not yet collected, and has been applied, as far as realized, to the costs of the administration and to the payment of the preferred debts of said testator.

VI. That all the equitable and legal real estate of the said testator, as far as your petitioner can ascertain, is situated in
35 the counties of Almance, Wake, Warren, Orange, Transyl-
[54] vania, Cherokee, Macon, Jackson, Catawba, and Swain. A description is hereto annexed, entitled, "Copy of inventory of the estate of G. W. Swepson" and marked "Exhibit A." The estimated value of the several and respective portions of real estate therein it is impossible to give; the whole is supposed to be worth about one hundred and fifty thousand dollars, as nearly as your petitioner can ascertain.

VII. That of the real estate mentioned in the next preceding paragraph hereof, the following prices and parcels situate in the counties of Alamance, Catawba, and Macon have been sold and con-

veyed to the following persons, to wit: In Alamance, one tract known as the Montgomery tract and another as the Dixon tract, in all about 178 acres, to Thomas M. Holt, at $3,500.00, which is a full and fair price. The lands northwest of Company Shops, known as the Rike land and Murray land, containing about three hundred acres, upon which Elisha Willis did live, and on which Christian Isley and W. S. Caffey now live, were sold and contracted to be sold to Christion Isley, W. S. Caffey, and John R. Caffey at the price of three thousand dollars, which is a full and fair price. In Catawba County, an undivided half in 60 acres adjoining the land of Nancy Lee and others to Sam'l Kale for $150.00; and undivided half in 88½ acres and 7¼ acres to M. B. Trolinger at $383.00; an undivided half in 108 acres to Lafayette Shuford at $432.00; an undivided half in 18¾ acres for $75.00 to F. M. Alley; an undivided half in 5 acres to Sidney Shuford for $40.00; an undivided half in 50 acres to Noah Barringer at $150.00; in Macon County, one tract of 230 acres for $460.00. And that said sales were made for a full and fair price and the [55] purchasers thereof are ready to comply with the terms of said sale.

VIII. That by his said will your petitioner, his executrix, is not given the power to sell the said lands, wherefore your petitioner prays that by order of this court she may sell the real property of her said testator or so much thereof as may be necessary for the payment of the debts of her said testator with the costs & charges of administering her testator's said estate and make title thereto as commissioner in such manner as the court may direct according to law.

IX. That the sales which your petitioner has made and contracted to make in the counties of Alamance, Catawba, and Macon herein set forth, may be confirmed and your petitioner authorized and directed to make title thereto as commissioner to the purchaser or purchasers thereof.

36 X. And for such and further orders and bequests in the premises as the nature of this case may require and to the court may seem meet.

VIRGINIA B. SWEPSON.

E. S. PARKER,
T. C. FULLER,
Atto. for Petitioner.

STATE OF NORTH CAROLINA,
Alamance County:

Mrs. Virginia B. Swepson, being duly sworn, says that the statements contained in the foregoing petition as of her own knowledge are true and those made upon information and belief she believes to be true.

A. TATE, *C. S. C.*

Copy of inventory of the estate of G. W. Swepson.

[56]

WAKE COUNTY.

1 house and lot in Oberlin, contracted to be sold to John E. Williams.

WARREN COUNTY.

A portion of the Little plantation, about 1,000 acres.

ORANGE COUNTY.

Part of Taylor & Clond tracts,	118 7/10	acres.
Street tract,	113	"
Webb, Courtney & Phillips tracts,	200	"
Town lots Nos. 119 & 238 in Hillsboro.		

ALAMANCE COUNTY.

Home tract,	134	"
Land bo't of Jno. Anderson & Mrs. Hunt,	61	"
Jos. Trolinger tract " Walnut Grove,"	68	"
Montgomery tract,	26	"
Part of tract near Co. Shops about,	80	"
Brannock land, subject to dower of Mrs. Brannock and life estate of John C. Harvey,	400	"

TRANSYLVANIA COUNTY.

An interest in a tract known as " Pink Beds," containing,	16,100	"

37

CHEROKEE COUNTY.

G. F. Morris lands about	1,600	"

[57]

Charles Moore lands,	680	"
D. Hennessea "	682	"
Betty Welch "	108	"
Maroney "	120	"
David Taylor "	1,038	"
E. P. Sharpe "	363	"
M. Fain "	300	"
M. Fain one-half interest in 2,698 acres,	1,349	"
M. Fain one-half interest in 20,602 "	10,301	"
Jacob Harshaw one-half interest in 2540 a.,	1,270	"
J. T. Young land,	109	"
A. P. Monday land one-half interest in about 4,000 acres,	2,000	"
J. W. Tatham land mineral interest in 201 acres mountain lands in this and other counties,	89,532	"

MACON COUNTY.

Mark May land,	100	acres.
Silas Green "	200	"
Leander Green land,	100	"
E. Hibbard "	100	"
R. B. Beasley "	375	"
J. L. Robinson "	149	"
N. S. Jarrett "	400	"
R. Beasley " mineral int. in 100 acres,		
Buchanan and Higden ⅓ of 640 & ¼ of 640	373	"

JACKSON COUNTY.

Interest of W. H. Bryson & R. N. Welch in 1,000 acres,	875	"
[58]		
Land bo't of W. H. Bryson,	23	"
Undivided ½ of 150 acres & the whole of 40 acres	115	"
Undivided ½ of 100 acres		
" 1/12 & 1/14 of 640 acres,		
" ¼ of 50 "		
" 1/6 of 100 "		

SWAIN COUNTY.

Smoky Mountain tract	60-120 acres	60-120 acres.

38 *Additional and supplementary inventory.*

1 Tract of land in Alamance Co. (Sycamore Falls)	15	acres.
1 " " " " " W. James land,	48	"
1 " " " " " Ireland tract,	578	"
1 " " " " " bo't of Ireland,	168	"
1 " " " " " Mebane land,	220	"
1 " " " " " Dixon land,	84	"
½ interest in 7 tracts of land in Catawba County 116¼ acres.	332¼	acres.

VIRGINIA B. SWEPSON.

Sworn to and subscribed this August 21st, 1884.

A. TATE, *C. S. C.*

STATE OF NORTH CAROLINA,
Wake County:

In the name of God, Amen.

I, George W. Swepson, of the county and State aforesaid, being of sound and disposing mind and memory, do make, ordain, and publish this my last will and testament.

[59] I. I give, devise, and bequeath to my beloved wife, Virginia B. Swepson, all of my estate and property, both real and personal, to her and her heirs forever.

II. I hereby nominate and appoint my said wife, Virginia B. Swepson, executrix of this, my last will.

GEORGE W. SWEPSON. [SEAL.]

Signed and published in the presence of the subscribers who have attested this will, in the presence of the testator, George W. Swepson, and at his request this 14th day of July, 1882.

E. BURKE HAYWOOD.
R. L. TUCKER.

NORTH CAROLINA, *Wake County, ss:*

I, Charles D. Upchurch, clerk of the Superior Court in and for the county and State aforesaid, do certify that the foregoing is a true and perfect copy of the last will and testament of George
39 W. Swepson, dec'd, the original of which is on file in my office and duly proven and recorded according to law.

In testimony whereof I have hereunto set my hand and affixed the seal of office this November 22d, 1883.

CHARLES D. UPCHURCH,
Clerk Superior Court.

SUPERIOR COURT, *Alamance County:*

[60]

In the matter of the petition of Mrs. Virginia B. Swepson, executrix and sole devisee and legatee of George W. Swepson, dec'd.

SPECIAL PROCEEDING FOR AUTHORITY TO SELL LAND.

Ex parte.

On this 21st day of August, 1884, this special proceeding, as set forth in the caption hereof, duly came on for hearing, and being heard, upon the petition and evidence adduced the court doth find the following facts, to wit:

1st. That George W. Swepson departed this life in the county of Wake, State of North Carolina, on the 7th day of March, 1883; that before his death he made his last will and testament, which, on the 12th day of March, 1883, was duly admitted to probate in the said county of Wake, which was the county of his domicile.

2nd. That by his said will he devised and bequeathed all of his property and estate, real, personal, and mixed, in fee simple and absolutely to the petitioner, his widow, and nominated and constituted her his sole executrix, and that the said petitioner duly qualified as executrix, and letters testamentary were duly issued to her according to law.

3d. That the amount of debts outstanding against the estate of said testator, as nearly as can be ascertained, is about four hundred thousand dollars ($400,000.00).

4th. That the value of the personal estate of said testator is about six thousand dollars, and has been applied, as far as realized, to the costs and charges of administration and the payment of debts preferred by law.

40 5th. That all the equitable and legal real estate of the said [61] testator is situated in the counties of Alamance, Wake, Warren, Orange, Transylvania, Cherokee, Henderson, Macon, Jackson, Catawba, and Swain, and that the same are set forth and described in Exhibit "A" annexed to the said petition, and the estimated value of the several respective portions—it is impossible to give the whole—is about of the value of one hundred and fifty thousand dollars.

6th. That of the said real estate the following pieces and parcels situate in the counties of Alamance, Catawba, and Macon have been sold, and contracted to be sold, by the commissioner to the following persons, to wit: In Alamance County, one tract known as the Joseph Trolinger tract, another as the Montgomery tract, and another as the Dixon tract, in all about one seventy-eight acres, to Thomas M. Holt, at $3,500.00, and the same is a just and fair price for said land. The lands northwest of Company Shops, known as the Rike land and Murray land, containing about 300 acres, upon which Elisha Willis did live, and on which Christian Isley and W. S. Caffey now live, were sold, and contracted to be sold, to Christian Isley, W. S. Caffey, and J. R. Caffey at the price of $3,000, which is a full and fair price for the same.

In Catawba County and undivided one-half in 60 acres adjoining the lands of Nancy Lee and others, sold and contracted to be sold, to Samuel Cale, for one hundred and fifty dollars, which is a fair and full price therefor; and an undivided half in 88½ acres and in 7½ acres, sold and contracted to be sold to M. V. Trolinger, at $383.00, which is a full and fair price therefor; and an undivided half in 108 acres sold, and contracted to be sold, to La Fayette Shuford, at $432.00, which is a full and [62] fair price therefor; and an undivided half in 18¾ acres sold, and contracted to be sold, to F. M. Alley, at $75.00, which is a full and fair price therefor; an undivided half in 5 acres sold, and contracted to be sold, to Sidney Shuford for $40.00, which is a full and fair price therefor; and an undivided half in 50 acres sold, and contracted to be sold, to Noah Barringer, at $150.00, which is a full and fair price therefor.

And in Macon County one tract of land of about 230 acres sold, and contracted to be sold, to ———, at $460.00, which is a full and fair price therefor.

7th. That by the terms of the said will power to sell land is not given; wherefore it is ordered and adjudged by the court that the sale of the whole of said land is necessary to enable the commissioner to pay the debts of her testator, and license and authority is hereby

given to the said commissioner to make title to the purchasers of the several tracts of lands sold, and contracted to be sold, to
41 the respective purchasers thereof, on the payment of the purchase money therefor, and said sales are hereby confirmed, and the title heretofore made for any of said lands so sold by the petitioner are confirmed, whether the same were made by her, as executrix, or not.

It is further ordered and adjudged that the said petitioner, as executrix, is hereby authorized and empowered to sell said lands either publicly or privately for cash or on credit as she may deem best and report said sales whenever made to this court for confirmation.

This *this* special proceedings be retained for further orders and directions.

A. TATE, *C. S. C.*

AUGUST 21, 1884.

In the Superior Court.

STATE OF NORTH CAROLINA,
Alamance County:

[63] V. B. Swepson, executrix of G. W. Swepson, deceased, and in her own name.

Ex parte.

In obedience to the order of this honorable court, the real estate of the late George W. Swepson was duly advertised according to law for public sale on the seventh day of September, 1885, at 12 m.; was exposed for public sale to the highest bidder at the courthouse door in the county of Graham upon the following terms, to wit:

One-half of the purchase money in six months, balance in twelve months with interest at 8% per annum, title reserved till land is paid for—and at the said sale the following parties became the highest bidders for the same and have complied with the terms of the sale subject to the confirmation of this honorable court, and it is respectfully recommended that this honorable court will give a reasonable time for other parties to bid for the same and appoint a day on which the sales herein described shall be confirmed, provided no better bids are filed.

Hereto is annexed the advertisement of the sale and description of the lands, which is made a part of this report:

1st tract, R. Y. McAden,	$800.00
2nd tract, R. Y. McAden,	350.00
3rd tract, R. Y. McAden,	500.00
4th tract, R. Y. McAden,	3,500.00
5th & 6th tracts, R. Y. McAden,	2,000.00
7th tract, this tract is incumbered 1st by the purchase money and its interest, 2d by ¼ of the profits (when sold) to be paid to the estate of J. L. Henry, [64] dec'd, 3d by $3,500.00,	

42 to be paid when sold to Mrs. V. B. Swepson; also by $500.00 to be paid T. C. Fuller, Esq., and $250.00 to be paid G. Rosenthal, trustee, sold to R. Y. McAden for $500.00

Tracts	8 to 16	to R. Y. McAden for	250.00
Tracts	17 to 29	to R. Y. McAden for	20.00
Tracts	31	" R. Y. McAden "	50.00
"	32	R. Y. McAden for	25.00
"	33	R. Y. McAden for	25.00
"	34	" "	10.00
	35	" "	51.00
	36	" "	10.00
	37	" "	2.00
	38	" "	31.00
	38-42 to	" "	85.00
Tract	43	"	55.00
"	44-46	" "	55.00
Lot	49	" "	50.00
"	50	" "	65.00
"	51	" "	5.00
"	52	" "	105.00
"	53	" "	1,000.00

Lots 8 to 53, inclusive, are encumbered by a mortgage given to R. W. Pulliam and N. W. Woodfin, trustees, for the benefit of the Western N. C. R. R., and which mortgage was sold and transferred to R. Y. McAden, the amount of said mortgage and interest being over $225,000.00.

Lot	30	sold	to	R. Y. McAden	for	$3,000.00
"	47	"	"	"	"	370.00
"	48	"	"	"	"	6.00

This land is covered by the mortgage aforesaid and also [65] by a deed of trust to G. Rosenthal, trustee, to secure debts mentioned therein and amounting to about $80,000.00.

Lot	54	sold	to	R. Y. McAden	for	1,200.00
"	55	"	"	"	"	750.00
"	57	"	"	G. Rosenthal	for	55.00
"	58	"	"	Doctor Murphy	for	35.00
"	60	"	"	R. Y. McAden	for	700.00
"	61 & 62	to	G. Rosenthal,			455.00

VIRGINIA B. SWEPSON,
Executrix of G. W. Swepson, dec'd, Commissioner.
VIRGINIA B. SWEPSON,

Filed 9th of September, 1885.

A. TATE, *C. S. C.*

43 Ex parte.

In the Superior Court—Special proceeding.

STATE OF NORTH CAROLINA,
Alamance County:

[66] Virginia B. Swepson, as executrix of Geo. W. Swepson, deceased, and in her own right.

In this special proceeding it appears to the court that in obedience to and in pursuance of an order herein made on the 21st day of August, A. D. 1884, the petitioner as executrix of the late Geo. W. Swepson, proceeded, after due advertisement, to sell the lands mentioned in the petition, other than those already sold or contracted to be sold, at the time of filing the petition as set out therein, at the courthouse door in Graham, on the 7th day of September, 1885, at public outcry to the highest bidder, upon the terms one half purchase money at six months and the other half at twelve months, each installment to carry interest from day of sale at the rate of eight per cent per annum, and title reserved until purchase money fully paid.

That report of said sale of said lands was filed on the 9th day of September, 1885, and that exceptions and objections to the confirmation of said sale were filed by T. J. Jones, a creditor, by his attorneys, Hinsdale and Scott & Caldwell. That said T. J. Jones has since assigned his evidence of debt against the estate of the testator, the said Geo. W. Swepson, to R. Y. McAden, the purchaser of nearly all of said lands, and the objections and exceptions to the confirmation of sale of said lands as reported has been withdrawn by said attorneys of said Jones, by leave of this court. That no advance bid has been placed upon any of said lands. Whereupon the court doth find and declare that ample time has been given, and no advance bid has been filed or made upon any of said lands. That said lands brought as much as can reasonably be expected to be realized therefrom. That the whole of the proceeds of sale of said lands is necessary to the administration of the estate of said testator and the payment of outstanding debts. Where- [67] fore it is now, on motion of E. S. Parker, attorney for petitioner, as executrix of Geo. W. Swepson, ordered, adjudged, and decreed that the sale of said lands so made on the 7th day of September, 1885, and the report thereof as filed on the 9th day of September, 1885, be, and the same is in all respects confirmed.

That the petitioner, Virginia B. Swepson, as executrix of Geo. W. Swepson, deceased, collect the purchase money from the purchasers as reported, with accrued interest thereon, and she may so col-
44 lect before the last installment is due, if the same is tendered, and upon the payment of the purchase money and interest accrued for the various parcels by the purchasers thereof, that she, the said executrix execute deed in fee for the various parcels and tracts to the purchasers thereof respectively or to their assigns.

That the proceeds arising from the sale of said lands be, and the same is hereby declared to be assets in the hands of the executrix petitioner to be accounted for in the administration of her testator's estate, after first paying therefrom the cost of this proceeding, together with the cost of advertising and making sale, and conveying title to the purchasers or their assigns.

That this decree be enrolled.

Done at office in Graham, this the 16th day of June, 1886.

A. TATE,
Clerk of the Superior Court, Alamance County.

[68] To this report is attached exhibit referred to containing the following:

Lot No. 53. Interest of Geo. W. Swepson, deceased, in 131 tracts of land in Cherokee County, to wit: * * * (Then follows reference to grant numbers of 131 tracts, including the following:

3008	2963
3009	3002
3010	3001
3011	2999
3012	2965
3013	2970
2984	3000
2982	2998

Each containing 640 acres.)

[69] In the report of the sale by the executor it appears that these same grant numbers referred to in the deed from Kope Elias to A. Rosenthal are embraced and included by the grant numbers and acreage and it is conceded that these cover the land claimed by the plaintiff.

Defendant introduced deed from Virginia B. Swepson, devisee and commissioner of R. Y. McAden, under decree of the Superior Court of Alamance County in a special proceeding entitled Virginia B. Swepson, executrix of George W. Swepson, deceased, and Rufus Y. McAden, dated 11th day of May, 1888, registered in Clay County 28th of June, 1888, Book "F," page 130, for the recited consideration of $3,769.00, conveying 131 tracts

45 Will of R. Y. McAden, dated April 9, 1889, devising these same lands, with other valuable property, to J. H. McAden, with power of sale, etc.

Deed from Henry M. McAden and others, the children and devisees of R. Y. McAden, to S. E. Cover and others, dated February, 1905, and registered in Clay County November 3, 1906, in Book "M" 300.

Deed from S. E. Cover and others to Hiawassee Lumber Company, dated May 17, 1906, registered in Clay County July 8, 1909, Book "P," page 221.

It is admitted that these conveyances cover the lands set out in the boundary claimed by the plaintiff, but by other tract numbers and

other grant numbers, and described by metes and bounds and the numbers set out in the Kope Elias deed. [70] Defendant also introduced State grant 2328 issued to G. W. Bristol, dated 20th day of December, 1860, for entry 2302, as shown on the map introduced by plaintiff, containing 790 acres, and registered on June 12, 1862, Book "A," page 67, reregistered December 27, 1896.

Defendant also introduces grant 2325, to George Bristol, and tract No. 5094, dated December 20, 1860, registered in Clay County June 26, 1862, Book A, page 77; reregistered November 28, 1906. This land is located as shown on the map. Together with mesne conveyances to W. C. Wash, dated 31 October, 1906, all of record in Clay County.

[71] Defendant introduces the following grants issued Nov. 10, 1867:

3008	6681	640
3009	6682	"
3010	6683	"
3011	6684	"
3012	6685	"
3013	6686	"
2984	6687	"
2982	6656	"
2963	6541	"
3002	6675	"
3001	6674	"
2999	6672	"
2965	6550	"
2970	6557	"
3000	6673	"
2998	6671	"

All of which were entered in Cherokee County May 16, 1859,
46 and were surveyed May 31, 1859, and June 1st, 1859, upon which grants were issued November 10, 1867. The lands in these grants are described in metes and bounds and are located as indicated on the map introduced in evidence, and cover the lands claimed by the plaintiff.

[72] Plaintiff introduced G. ROSENTHAL, who testified as follows:

Q. Where did you live in the year 1880?

A. Raleigh.

Q. Did you know A. Rosenthal?

A. Yes; he was my brother.

Q. Where did he come from. Was he born and raised in North Carolina?

A. Pennsylvania. Born and *raise* in Germany, and came from Pennsylvania to this State.

Q. What year from Pennsylvania to North Carolina?

A. 1880.

Q. At whose instance?

A. At my instance.
Q. In whose employ did he engage after he came?
A. Geo. W. Swepson.
Q. What did he do?
A. Kept store at the Swepson Cotton Mills.
Q. In what county?
A. Alamance.
Q. What kind of a store?
A. General merchandise.
Q. How old was he at that time?
A. About 46 years old.
Q. Was he a man of means?
A. No, sir.
Q. Who paid his expenses here from Pennsylvania?
A. I think I sent him the money.
Q. Then, in 1882 had he accumulated anything?
A. Not that I know of. He was in the employe of Geo. W. Swepson until 1888, at a salary of $75 per month. He was never in western North Carolina. He owned no property. He is now dead.

[73] Plaintiff introduced Capt. S. A. Ashe, who testified as follows:
Q. Where do you live?
A. Raleigh.
Q. How long have you lived there?
A. About forty years.
Q. Were you ever connected with the News & Observer?
A. Yes.
Q. What period?
A. From the time of its beginning until 1894.
Q. When was the beginning?
A. 1880.
Q. What connection had you?
A. I was editor and part owner; manager.
Q. Do you know Geo. W. Swepson?
A. Yes.
Q. Where did he live at that time?
A. Raleigh.
Q. Was he well known there?
A. Yes.
47 Q. Was he a man of any business?
A. Yes.
Q. Business affairs?
A. Yes.
Q. Extensive business transactions?
A. I don't know much about the nature of his business, but he was a man of means and a man of affairs.
Q. How many daily papers published in Raleigh in 1880?
A. One morning paper. Later there was a small afternoon paper.
Q. Was Mr. Swepson a subscriber to your paper?

A. I don't remember the names of the persons who were subscribers to the paper.

Q. Do you remember about Mr. Swepson?

A. To the best of my knowledge and belief he was a subscriber.

Q. Did you look for the list before you came up here?

A. Yes. It is not in existence at this time, and I couldn't find it.

Q. Turn to your paper issued on November 9th, 1880, and for four issues of that to November 25. Is what you have there the files of the News & Observer during the month of November, 1880?

A. Yes. Here it is.

Judge MERRIMON. Will you state what you mean by offering it?

Mr. HOLTON. That it was published and contains record in regard to 3110. On November 25th, 1880, the Government offers to sell it. That is a circumstance tending to show that Mr. Swepson had notice of it.

[74] Mr. BELL. Objection by defendant as incompetent to any issue raised by the pleadings.

Mr. HOLTON. If they do not claim to be bona fide purchasers without notice, I will withdraw the paper.

The COURT. You are attempting to show by Capt. Ashe that he was the owner and editor of the News & Observer, and that in the November 9th issue of his paper he published a notice in which the Government of the United States proposed to sell at auction on November 25th this particular tract of land, 3110, now in controversy, of 5,000 acres in Clay County.

Mr. HOLTON. Yes; we offer it as a circumstance showing that G. W. Swepson had notice of the Government's claim; actual notice. We have shown him to be a reader of the paper.

Judge MERRIMON. The witness did not say that he was a reader. The paper is all right, I take it, and the advertisement printed as therein stated. I take it that they wouldn't contend that was constructive notice. I don't think that what Capt. Ashe says
48 about Swepson is a sufficient circumstance to say whether he actually read that paper or that he read the advertisements.

The COURT. Do you offer this paper as showing actual notice?

Mr. HOLTON. Evidence of it.

The following was the notice referred to in the paper. This notice was published in the issues of the paper of November 9th, 16th, 23rd, and 24th, viz:

United States sale of 32,480 acres of land in Cherokee, Graham, and Clay Counties, North Carolina.

By virtue of section 3749, Revised Statutes of the United States, the undersigned will offer at public auction, at the United States courthouse in the city of Raleigh, N. C., on Thursday, the 25th of November, 1880, the following-described lands, consisting of about 32,480 acres in the above-named counties, acquired by the United States in payment of debt, the same conveyed by the State of North

Carolina to E. B. Olmsted by sundry deeds dated November 10, 1867, under designation of the following-enumerated grants, each being described in the deed of the State of North Carolina to the said Olmsted therefor, recorded in the office of the secretary of state of North Carolina, as also in the deed of Levi Stevens, grantee of said Olmsted to the United States, dated March 15, 1869, recorded in Book "M," pages 341 to 355, Cherokee County records, such grants being known and numbered and containing the quantities of land as follows, viz: Grants numbered [75] 3082, of 640 acres; 3083, of 560 acres; 3084 to 3100, inclusive, each of 640 acres; 3001, of 283 acres; 3102 to 3109, inclusive, each of 640 acres; 3110, of 5,000 acres, in Clay County; 3121 to 3125, inclusive, each of 640 acres, and No. 3136, of 400 acres.

Terms of sale.—One-half cash; balance in one year, with interest secured on the property, or all cash, at the purchaser's option. A deposit of $200 required from the successful bidder at the time of sale if sold in a body, and of ten per cent if sold in parcels. A conveyance will be made by the United States of all its right and title. The Government reserves the right of one bid to prevent unreasonable sacrifice.

K. RAYNER,
Solicitor of the Treasury.

JOHN SHERMAN,
Secretary of the Treasury.

49 At the close of the testimony the defendant asked the court to direct a verdict for the defendant upon the issues submitted. Thereupon the court granted the motion and directed the jury to answer the first issue in the negative, to which the plaintiff excepted, while the jury was still in the box and before they considered the instructions of the court as given and before they rendered their verdict, exception allowed, signed, and sealed.

JAS. E. BOYD, *U. S. Judge.*

Exception No. 5.

[76] Defendant offered in evidence the certified copy of the transcript of record from Macon County, wherein Geo. W. Swepson is named as plaintiff and E. B. Olmstead as defendant, as a link in the chain of its title. This certified copy is set out in full in exception No. 4, page — of this bill of exceptions.

Plaintiff objected to the introduction of this certified copy of the transcript upon the ground that it does not appear that a summons was issued or served on the defendant, nor did the defendant appear or answer. Objection overruled, transcript admitted, plaintiff excepted, exception allowed, signed, and sealed.

JAS. E. BOYD.

Exception No. 6.

Defendant offered in evidence the certified copy of the transcript of record from Macon County wherein Geo. W. Swepson is named as plaintiff and E. B. Olmsted as defendant, as a link in the chain of its title. This certified copy is set out in full in exception No. 4, page — of this bill of exceptions.

Plaintiff objected to the introduction of this certified copy of the transcript upon the ground that it does not contain a description of the land in controversy; its only reference to description is to Exhibit "A," and Exhibit "A" is not attached nor introduced as evidence, and there is no evidence that it ever existed. Objection overruled, transcript admitted, plaintiff excepted, exception allowed, signed, and sealed.

JAS. E. BOYD, *U. S. Judge.*

50 Exception No. 7.

[77] Defendant offered in evidence a certified copy of a deed from Kope Elias to A. Rosenthal, the material parts of which is set out in exception No. 4, page —, of this bill of exceptions, dated October 28, 1882, registered in Clay County, October 17, 1890, in Book "F," page 282.

Plaintiff objected to the introduction of this certified copy of the deed upon the ground that there was no authority contained in the record of the case of Swepson vs. Olmsted, to convey the five thousand acres of land therein described, or any part thereof. Objection overruled, transcript admitted, plaintiff excepted, exception allowed, signed, and sealed.

JAS. E. BOYD, *U. S. Judge.*

Exception No. 8.

[78] At the close of the testimony and while the jury was still in the box the plaintiff requested the court to give the following special instructions:

1. The jury is instructed that if they believe the evidence in this case the plaintiff is entitled to recover the land described in its complaint and should answer the issue yes.

2. The jury is instructed that the defendant can derive no title as against the plaintiffs to the land described in the plaintiff's complaint from the quitclaim deed from E. B. Olmsted to A. Rosenthal, dated October 31, 1883, since said quitclaim deed was registered in 1906 after the registration of the deeds in 1896 from said Olmsted and wife to Levi Stevens and from said Stevens and wife to the plaintiff in this case.

3. The jury is instructed that the defendant can derive no title as against the plaintiff to the land described in plaintiff's complaint

from, through, or under the proceeding in Macon County Court, in which proceeding G. W. Swepson was plaintiff and E. B. Olmsted was defendant, a certified copy of which was put in evidence in this case, because the land sued for in the present action is not sufficiently described either in the complaint or decree for sale, or decree for confirmation in said proceeding in Macon County Court.

4. The jury is instructed that the defendant can derive no
51 title as against the plaintiff to the land described in the plaintiff's complaint, from, through, or under the proceeding in Macon County court, in which proceeding G. W. Swepson was plaintiff and E. B. Olmsted was defendant, a certified copy of which was put in evidence in this case because it does not appear that E. B. Olmsted was made a party to said proceedings, by service of summons by publication, nor did he appear to answer thereto.

5. The jury is instructed that if the United States took the deed from Levi Stevens and wife for a valuable consideration and without notice of any equity existing in favor of G. [79] W. Swetson, then the United States acquired title to the lands described in the complaint unaffected by such equity.

6. That the deed executed by said Olmsted and wife to Levi Stevens in 1868 and the deed from said Olmsted and wife to the United States in 1869 conveying the lands in controversy and registered in 1896 vested the title to said lands in United States from the date of its execution as against all conveyances executed after said date by said Olmsted or under any deed made in pursuance of any judicial proceeding in which said Olmsted was a party, the object of which was to sell said lands.

7. That if A. Rosenthal at the time he purchased from Kope Elias had notice that the United States had, prior to the institution of the proceeding under which said Elias sold, acquired the title to the lands in controversy and held the same under an unregistered deed, then the said Rosenthal acquired no title thereto as against the plaintiff.

8. That if the said Rosenthal had knowledge of any fact which was sufficient to put him upon inquiry relative to the rights of the United States it was adequate notice of everything to which said inquiry would have led.

8a. Since the deed from E. B. Olmsted and wife to Levi Stevens put in evidence was made in 1868 and the deed from Levi Stevens and wife to the United States was made in 1869, if the jury finds said deeds embrace the land described in plaintiff's complaint, and since said deeds were executed prior to the 1st day of December, 1885, if the jury finds from the evidence that the defendant had either actual or constructive notice of such deeds, at the time the defendant took or purchased the land described in the plaintiff's complaint, the jury is now instructed that the defendant cannot derive title to said land as against the United States under a deed therefor and before 1885 by E. B. Olmsted or executed in pursuance to a [80] decree of the court attempting to divest his title.

52 8b. The jury is instructed that when the plaintiff had the deeds from Olmsted and wife to Levi Stevens and from said Stevens and wife to the plaintiff duly and properly registered in 1896 that then the said deeds became and were constructive notice to the defendant in this case taking or purchasing under A. Rosenthal after the registration of said deed in 1896.

9. That the recital in the proceedings that E. B. Olmsted had conveyed to the United States 32,000 acres of land was sufficient to put said Rosenthal upon notice of all he would have ascertained by following up the inquiry and this rule applies to all subsequent purchasers under Rosenthal.

10. That if the deed from Levi Stevens to the United States conveyed the 32,000 acres of land referred to in the complaint in the case of Swepson vs. Olmsted and that this was the conveyance referred to therein, and that the lands described in the complaint in the present action were embraced therein, then said Rosenthal cannot claim to be a bona fide purchaser without notice, nor can any one claiming under him be such a purchaser, and that under those circumstances no title was acquired as against the United States holding the same under an unregistered deed.

11. That all persons purchasing the lands from Rosenthal or under him after May 20, 1896, the date of the registration of deeds from Olmsted to Stevens and from Stevens to the United States were fixed with notice and cannot be heard to say that they are purchasers without notice.

12. That the said quit-claim deed from Rosenthal to McAden was not made upon a valuable consideration.

13. That if the purchasers from Olmsted had knowledge or by reasonable inquiry could have acquired knowledge of the existence of the deeds from Olmsted to Stevens and from Stevens to the United States, then they cannot be heard to say that they did not know where the lands described therein were located if such deed contained sufficient description to locate the land.

14. That where a purchaser claims to be a bona fide purchaser for value and without notice the burden is upon him to [81] establish these facts to the satisfaction of the jury.

15. That if G. W. Swepson procured the land to be sold for the payment of only $500 and had same bid in by Rosenthal as his agent at the sum of $40,000 he cannot thereby claim to be a bona fide purchaser for value.

53 16. That if A. Rosenthal bid in said lands as the agent of G. W. Swepson and took the deed therefor from Kope Elias, commissioner in trust for said Swepson, and if Swepson knew of the claim of the Government, then the title acquired by the deed of Kope Elias was subject to the Government's claim and would not be a bona fide conveyance without notice.

17. That if the 5,000-acre tract described in the complaint is a part of the 32,000 acres referred to in the complaint of G. W. Swep-

son vs. E. B. Olmsted, then any person taking under the sale will take with notice.

18. That it is not a question of whether there was a survey lawfully authorized, but the question is, was the point or chestnut located at the red hand the point called for as the chestnut in the Macon County line on the Tusquita Bald in the complaint.

19. The jury is instructed that since the defendant claims title under E. B. Olmsted, under whom the plaintiff also claims title, that the defendant is estopped to deny that the survey or surveys on which Olmsted's title depends, were made, and the defendant is also estopped to deny that such survey or surveys were made at the proper time as required by law.

21. The jury is instructed to find this issue for the Government if they find that the land described in the deeds from Olmsted to Levi Stevens and from Levi Stevens to the United States is located or described in the red lines.

which the court declined to give. Thereupon while the jury was still in the box, and before they considered the instructions [82] of the court as given, and before they rendered their verdict the plaintiff excepted, exception allowed, signed, and sealed.

JAS. E. BOYD, *U. S. Judge.*

Feb. 14, 1912.

Exception No. 9.

[83] Upon the issues submitted and returned by the jury under the instructions of the court, the court rendered judgment in favor of the defendant, to which judgment the plaintiff excepted. Exception allowed, signed, and sealed.

JAS. E. BOYD, *U. S. Judge.*

54 [84] The foregoing contains the bill of exceptions as submitted by plaintiff.

A. E. HOLTON,
U. S. Attorney.
A. L. COBLE,
As. U. S. Attorney.
S. W. WILLIAMS,
Special Asst.

DECEMBER 26, 1911.

(Endorsed:) U. S. vs. Hiawassee Lumber Company. Bill of exceptions.

Service of this bill of exceptions accepted and copy received December 27, 1911.

JAMES H. MERRIMON,
One of the Attorneys for Defendants.

Petition for writ of error.

U. S. District Court. Filed Feb. 15, 1912. J. M. Millikan, clerk.

[85]

In the District Court of the United States, Western District of North Carolina, at Asheville.

UNITED STATES
vs.
HIAWASSEE LUMBER CO.

And now comes the plaintiff herein, the United States, and says that on the 18th day of November, 1911, judgment was rendered in the United States Circuit Court, at Asheville, in favor of the defendant herein named, against the plaintiff, in which judgment and proceeding in said cause certain errors were committed to the prejudice of this plaintiff, all of which will more fully appear in detail in the assignment of errors which is filed with this petition.

Wherefore, the plaintiff, the United States, prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Fourth Circuit for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause duly authenticated, may be sent to the said Circuit Court of Appeals.

A. E. HOLTON, *U. S. Attorney.*

55 Upon the foregoing petition and assignment of errors attached it is ordered that a writ of error issue as prayed for in the petition.

This 13 day of February, 1911.

JAS. E. BOYD, *U. S. Judge.*

Assignment of errors.

U. S. District Court, Asheville, N. C. Filed Feb. 15, 1912. J. M. Millikan, clerk.

In the District Court of the United States, Western District of North Carolina, at Asheville.

HIAWASSEE LUMBER CO.
vs.
UNITED STATES.

ASSIGNMENT OF ERRORS.

[86] The plaintiff, the United States, through A. E. Holton, U. S. attorney for the Western District of North Carolina, makes the fol-

lowing assignment of errors which it avers were made by the court in the progress of the trial and in the judgment in the above-entitled case, to wit:

1.

That the court erred in holding that the registration of the deed offered in evidence from E. B. Olmsted and wife to Levi Stevens for the five thousand acres of land, dated February 7, 1868, recorded in the office of the register of deeds of Clay County on February 23, 1869, was invalid to pass title as of February 23, 1869. (See exception No. 1.)

2.

That the court erred in excluding the record of the register of deeds from E. B. Olmsted and wife to Levi Stevens, registered in Clay County February 23, 1869, when offered by the plaintiff after the defendant had introduced its evidence for the purpose of showing notice to purchasers simply as a circumstance giving notice. (See exception No. 2.)

3.

That the court erred in excluding the testimony of E. T. Shearer offered by the plaintiff to show the declarations of
56 Standridge in 1893, in which he stated that the chestnut stump was the beginning corner of the Government tract, it having been shown that the declaration was made by the surveyor Standridge that the chestnut corner was the beginning corner of the Government tract, and it further appearing that Standridge was dead and had no interest in locating the same. (See exception No. 3.)

4.

[87] That the court erred in holding and ruling that upon all the evidence the plaintiff was not entitled to recover. (See exception No. 4.)

5.

That the court erred in not holding that upon the evidence the plaintiff was entitled to recover and to have the issues answered in its favor. (See exception No. 4.)

6.

That the court erred in instructing the jury to answer the issues in the negative. (See exception No. 4.)

7.

That the court erred in directing a verdict for the defendant. (See exception No. 4.)

8.

That the court erred in not excluding the certified copy of the record from Macon County wherein Geo. W. Swepson was plaintiff and E. B. Olmsted defendant, it not appearing that a summons was issued or served on the defendant nor that the defendant appeared or answered. (See exception No. 5.)

9.

That the court erred in not excluding the certified copy of the record from Macon County wherein Geo. W. Swepson was plaintiff and E. B. Olmsted defendant, upon the ground that it does not contain a description of the land in controversy, its only reference to the description is to Exhibit A, and Exhibit A is not attached nor introduced as evidence and there is no evidence that it ever existed. (See exception No. 6.)

57

10.

That the court erred in holding, as a matter of law, that the description in the deed from Kope Elias, commissioner, to G. Rosenthal supplied the want of description in the complaint and other proceedings in the case of Swepson vs. Olmsted. (See exception No. 6.)

11.

[88] That the court erred in holding that the record in the case of Swepson vs. Olmsted authorized the commissioner to convey the five thousand acre tract of land now in controversy. (See exception No. 6.)

12.

That the court erred in holding that the deed from Kope Elias to G. Rosenthal passed an estate in the five thousand acre tract of land therein described, there being not sufficient description of the said lands in the order of court to authorize the said Kope Elias to convey the same, or any part thereof. (See exception No. 7.)

13.

That the court erred in not giving the first special instruction asked for by the plaintiff. (See exception No. 8.)

14.

That the court erred in not giving the second special instruction asked for by the plaintiff. (See exception No. 8.)

15.

That the court erred in not giving the third special instruction asked for by the plaintiff. (See exception No. 8.)

16.

That the court erred in not giving the fourth special instruction asked for by the plaintiff. (See exception No. 8.)

17.

That the court erred in not giving the fifth special instruction asked for by the plaintiff. (See exception No. 8.)

58

18.

That the court erred in not giving the sixth special instruction asked for by the plaintiff. (See exception No. 8.)

19.

That the court erred in not giving the seventh special instruction asked for by the plaintiff. (See exception No. 8.)

20.

That the court erred in not giving the eighth special in- [89] struction asked for by the plaintiff. (See exception No. 8.)

21.

That the court erred in not giving the ninth special instruction asked for by the plaintiff. (See exception No. 8.)

22.

That the court erred in not giving the tenth special instruction asked for by the plaintiff. (See exception No. 8.)

23.

That the court erred in not giving the eleventh special instruction asked for by the plaintiff. (See exception No. 8.)

24.

That the court erred in not giving the twelfth special instruction asked for by the plaintiff. (See exception No. 8.)

25.

That the court erred in not giving the thirteenth special instruction asked for by the plaintiff. (See exception No. 8.)

26.

That the court erred in not giving the fourteenth special instruction asked for by the plaintiff. (See exception No. 8.)

27.

That the court erred in not giving the fifteenth special instruction asked for by the plaintiff. (See exception No. 8.)

59 28.

That the court erred in not giving the sixteenth special instruction asked for by the plaintiff. (See exception No. 8.)

29.

That the court erred in not giving the seventeenth special instruction asked for by the plaintiff. (See exception No. 8.)

30.

That the court erred in not giving the eighteenth special instruction asked for by the plaintiff. (See exception No. 8.)

31.

That the court erred in not giving the nineteenth special instruc-
[90] tion asked for by the plaintiff. (See exception No. 8.)

32.

That the court erred in not giving the twentieth special instruction asked for by the plaintiff. (See exception No. 8.)

33.

That the court erred in rendering judgment for the defendant. (See exception No. 9.)

Wherefore the plaintiff in error in the Circuit Court of Appeals, the United States, prays that the judgment of the said District Court may be reversed.

A. E. Holton, *U. S. Attorney.*

Writ of error.

[91] U. S. District Court, Asheville, N. C. Filed Feb. 15, 1912. J. M. Millikan, clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the District Court of the United States for the Western District of North Carolina, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said (late) Circuit
60 Court, before you, or some of you, between United States, plaintiff, and The Hiawassee Lumber Company, defendant, a manifest error hath happened, to the great damage of the said defendant as by said complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fourth Circuit, together with this writ, so that you have the same at Richmond, on the 13th day of March next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Edward D. White, Chief Justice of the United States, this 13th day of February, in the year of our Lord one thousand nine hundred and twelve.

[SEAL OF COURT.] J. M. MILLIKAN,
Clerk of the District Court of the United States.

Allowed by—
JAS. E. BOYD, *U. S. Judge.*

Filed in this office Feb. 13, 1912.

J. M. MILLIKAN, *Clerk.*

Citation.

U. S. District Court, Asheville, N. C. Filed Feb. 15, 1912. J. M. Millikan, clerk.

[92] UNITED STATES OF AMERICA, *ss:*

The President of the United States to Hiawassee Lumber Company, greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond, on the 13th day of March next, pursuant to an appeal

from a decree of the (late) Circuit Court of the United States,
61 Fourth Circuit, at Asheville, N. C., in your favor passed in a cause in said court wherein the United States was plaintiff and you are defendant, to show cause, if any there be, why the judgment rendered against the said plaintiff in said cause mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 13th day of February, in the year of our Lord one thousand nine hundred twelve.

JAS. E. BOYD, *U. S. Judge.*

Service of this citation accepted, this 15th day of February, 1912.

JAMES H. MERRIMON,
Attorney for Defendant.

[93] And, thereupon, it is ordered by the court here, that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the clerk of the United States Circuit Court of Appeals for the Fourth Circuit, and the same is transmitted accordingly.

Test:

J. M. MILLIKAN, *Clerk,*
By W. S. HYAMS, *Deputy Clerk.*

Clerk's certificate.

[94] I, J. M. Millikan, clerk of the District Court of the United States for the Western District of North Carolina, certify that the foregoing is a true, full, and complete transcript of the record and proceedings in the case of United States vs. Hiawassee Lumber Company, made in accordance with the bill of exceptions incorporated herein, in the above entitled cause, as fully as the same remains on file and of record in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said court at office in the city of Asheville, this 1st day of March, A. D. 1912.

[SEAL OF COURT.]

J. M. MILLIKAN,
Clerk U. S. District Court,
By W. S. HYAMS, *Deputy Clerk.*

62

63 On the same day, to wit, March 5, 1912, the appearance of A. E. Holton, United States district attorney, and S. W. Williams, special assistant to U. S. attorney, is entered for the plaintiff in error.

March 13, 1912, the appearance of James H. Merrimon and Marshall W. Bell is entered for the defendant in error.

March 28, 1912, twenty copies of the printed record are filed.

Stipulation as to filing briefs.

Filed May 9, 1912.

United States Circuit Court of Appeals, Fourth Circuit.

UNITED STATES
vs.
THE HIAWASSEE LUMBER COMPANY.

Agreement.

It is agreed by counsel that the defendant may have until the call of this case to file briefs, and that same may be filed with the court in Asheville, instead of in Richmond.

This May 8th, 1912.

A. E. HOLTON,
U. S. Attorney for Plaintiff.
M. W. BELL,
Of Counsel for Deft.

May 31, 1912 (May term, 1912), cause continued in open court upon request of district attorney, until July 10, 1912, at Richmond, Virginia.

Stipulation as to use of maps.

Filed June 12, 1912.

United States Circuit Court of Appeals, Fourth Circuit.

UNITED STATES
vs.
HIAWASSEE LUMBER COMPANY.

Stipulation.

64

65 It is stipulated by counsel that four of the original maps made by E. T. Shearer and H. S. Hayes, surveyors, showing the location of the lands involved in this action and referred to on page 25 of the record and not printed, by order of the district attorney, shall be sent by the clerk of the District Court of Appeals for use in the argument of the case.

A. E. HOLTON,
Attorney for Appellant in Error.
M. W. BELL,
Attorney for Defendant in Error.

Accordingly is is so ordered this June —, 1912.

_____ _____,
U. S. Circuit Judge.

June 14, 1912, the four maps certified up received.

July 10, 1912 (July session, 1912), the cause is continued by consent of counsel until the November term, 1912.

Argument of cause.

November 12, 1912 (November term, 1912), the cause came on to be heard before Goff and Pritchard, circuit judges, and Waddill, district judge, and is argued by counsel, and submitted.

December 21, 1912 (November term, 1912), the court announced and filed its opinion, which is as follows, to wit:

Opinion.

Filed Dec. 21, 1912.

66

67 United States Circuit Court of Appeals, Fourth Circuit.

THE UNITED STATES, PLAINTIFF IN ERROR,
versus
THE HIAWASSEE LUMBER COMPANY, DEFENDANT IN ERROR. } No. 1102.

In error to the District Court of the United States for the Western District of North Carolina, at Asheville.

(Argued November 12, 1912. Decided December 21, 1912.)

Before GOFF and PRITCHARD, circuit judges, and WADDILL, district judge.

A. E. Holton, U. S. attorney, and Stephen W. Williams, special assistant U. S. attorney (A. L. Coble, assistant U. S. attorney, on briefs), for plaintiff in error, and James H. Merrimon and Marshall W. Bell, for defendant in error.

This was an action of ejectment brought by the United States against the Hiawassee Lumber Company, in the District Court of the United States for the Western District of North Carolina, to recover 5,000 acres of land embraced in grant No. 3110, situate in Clay County, North Carolina, as set out in the complaint.

68 The plaintiff alleges its ownership of the land, and that the defendant is in the unlawful possession of the land and unlawfully withholds same from the plaintiff, to its damage in the sum of $1,000.00.

The defendant in its answer denies the ownership of plaintiff of the land, and says that "it (the defendant) is in possession of tract No. 6687, by virtue of grant No. 2984, which tract is lapped in part by the land claimed by plaintiff, as plaintiff contends its tracts is located, but defendant denies that plaintiff's tract can be located at all; and defendant denies that its possession of said land is wrongful but avers that such possession is lawful and right under bona fide title superior to any title in or claimed by plaintiff." It also admits that it is a corporation, and sets up by way of affirmative relief that it is the owner in fee simple of tract No. 6687, grant No. 2984, is in possession of same, and that plaintiff claims some estate or interest in

the land adverse to defendant, which is without foundation in fact or law and is injurious to defendant's title and possession.

In the trial of the case in the court below the plaintiff introduced the following evidence:

(a) Grant No. 3110 to E. B. Olmstead, dated November 10, 1867, registered in Cherokee County, November 9, 1868, in Book K, page 561. And the certificate of survey attached to the grant purporting to show a survey of tract No. 4500 on February 20, 1854, by J. B. Baker, C. S. (county surveyor), and Thos. Holland and J. C. Huskins, chain bearers (C. B.).

(b) A deed from E. B. Olmstead et ux. to Levi Stevens, dated February 7, 1868, purporting to be registered in Clay County February 23, 1869, in Book A, page 329, and registered in Clay County May 20, 1896, in Book H, page 61, conveying said tract of land.

(c) A deed from Levi Stevens et ux. to the United States of America, dated March 15, 1869, purporting to be registered in Cherokee County August 4, 1871; registered in Clay County May
69 20–22, 1896, in Book H, page 67, conveying said 5,000-acre tract, and certain other tracts not relating to any lands embraced in this action, but which are situate now in Graham County.

(d) Sixteen grants issued to E. B. Olmstead each for 640 acres, dated November 10, 1867, namely:

Grant.	Entry.	Grant.	Entry.
3008	6681	3009	6682
3010	6683	3011	6684
3012	6685	3013	6686
2984	6687	2982	6656
2998	6671	3000	6673
2970	6557	2965	6550
2999	6672	3001	6674
3002	6675	2963	6541

including the certificate of survey attached to each grant, the entries having been made on May 16, 1859, which were surveyed on May 31 and June 1, 1859.

It was admitted that the descriptions in these grants embrace the lands described on the map as indicated by the entry numbers and grants marked and described thereon.

(e) A map made by the surveyors, Shearer and Hayes, showing tract No. 4500 in RED lines and the sixteen tracts in BLACK lines. Defendant claims the lands embraced in the black lines, under the said grants, and which came to them after the grants were issued, as follows:

(f) Deed from K. Elias, commissioner, to A. Rosenthal, dated October 28, 1882, registered in Clay County, October 17, 1890, in Book F, page 282; it conveys about ninety different grants situate in the counties of Cherokee, Macon, Swain, and Jackson, which are severally described by metes and bounds, including Nos. 3008, 3009, 3010, 3011, 3012, 3013, 2984, 2982, 2963, 3002, 3001, 2999, 2965, 2970, 3000, and

2998, but does not include grant No. 3110 for tract No. 4500. This deed recites that it was made "by virtue of the decree of the
70 Superior Court of Macon County, rendered at spring term, 1882, appointing, authorizing, and empowering K. Elias, commissioner, to make sale of the lands hereinafter mentioned and described; and whereas by virtue of the authority and power vested in me, as commissioner aforesaid, I did sell and make a report thereof at the Superior Court of said county at its fall term, 1882, which report was in all things confirmed. At which time a further and final decree was made by the court authorizing and directing me as commissioner aforesaid, to execute and deliver a deed of conveyance to A. Rosenthal, the purchaser."

As foundation for this deed, defendant introduced a record from the Superior Court of Macon County, North Carolina, certified by W. N. Allman, clerk, and under the seal of the court, dated October 25, 1882, in a case entitled "G. W. Swepson v. E. B. Olmstead," showing complaint; decree at spring term, 1882, signed by H. A. Gilliam, judge, reciting that "a writ of summons has been duly executed on defendant and no defence was made to this action," and it is "ordered, adjudged, and decreed that the plaintiff have and recover of the defendant the lands mentioned in his complaint and marked 'Exhibit A,' amounting to 89,532 acres." That defendant is trustee of plaintiff and holds said land as trustee for plaintiff's benefit, and it is ordered that same be sold, and out of the proceeds of sale the sum of $500.00 is to be paid to defendant, then pay costs and pay the residue to the plaintiff, and the lands conveyed to the purchaser, and K. Elias is appointed commissioner to make the sale, conveyance, and payment.

A report is made to the court at the fall term, 1882, showing a sale of the lands mentioned in the decree to A. Rosenthal for $40,000.00, that he is ready to pay it into court upon confirmation of the sale, and that he has paid the $500.00 to the defendant, Olmstead.

At the fall term, 1882, final decree is made by his honor James E. Shepherd, judge, confirming the sale in all things and ordering the commissioner to make deed to Rosenthal upon payment of the residue of the money due the plaintiff.

71 (g) A deed from E. B. Olmstead et ux. to A. Rosenthal, dated October 31, 1882, registered in Clay County November 12, 1906, in Book M, page 337, quitclaiming all interest in all the lands set out in said deed from Elias, commissioner, to Rosenthal.

(h) A deed from A. Rosenthal et ux. to J. H. McAden, in trust for the heirs and devisees of Rufus Y. McAden, dated May 21, 1889, registered in Clay County May 21, 1906, in Book M, page 114, conveying all the lands embraced in the deed from Elias, commissioner, to Rosenthal, and from Olmstead and wife to Rosenthal.

(i) Certified copy of the last will and testament of George W. Swepson, devising all of his property to his wife, Virginia B. Swepson, dated July 14, 1882.

(j) Certified copy of a special proceeding in the Superior Court of Alamance County, entitled "In the matter of the petition of Mrs. Virginia B. Swepson, executrix, and sole devisee and legatee of George W. Swepson, dec'd." A petition is sworn to by Mrs. Swepson on August 21, 1884, wherein, among other things, it is set out that the testator died indebted in the sum of about $400,000.00, that he devised all of his estate to petitioner and appointed her sole executrix of his will, that his personal estate amounted to about $6,000.00 and has been applied, as far as realized on, to costs of administration; that his equitable and legal real estate is situated in ten (designated) counties and is set out in an attached inventory; that the will contains no power to sell and asks for an order to sell so much of the real estate as may be necessary to pay his debts, with costs and charges of administration.

An order is made by the clerk on August 21, 1884, finding the facts set out in the petition and adjudging it necessary to sell the whole of testator's lands to enable her to pay his debts, and authorizing and empowering her to sell the lands publicly or privately, for cash or on credit, and make report.

72 Report was filed by her September 9, 1885, showing that, after due advertisement according to law, she sold the lands at public sale at the courthouse door in Graham, Alamance County, on September 7, 1885, half purchase money in six months, balance in twelve months, with interest, to various persons, among them "Lot 53 to R. Y. McAden for $1,000.00; lots 8 to 53, inclusive, are encumbered with a mortgage of over $225,000.00, including interest."

Decree, dated June 16, 1886, confirms the sale of September 7, 1885, and orders deeds to be made to the various parties, etc., and to this it attached an exhibit showing that "Lot No. 53" contains, among others, the sixteen grants under which defendants claim.

(k) Deed from Virginia B. Swepson, executrix, devisee and commissioner, to R. Y. McAden, dated May 11, 1888, registered in Clay County June 28, 1888, in Book F, page 130.

(l) Will of R. Y. McAden, dated April 9, 1889, devising these lands to J. H. McAden, trustee, with power of sale, etc.

(m) Deed from Henry M. McAden et als., children and devisees of R. Y. McAden to S. E. Cover and others, dated February, 1905, registered in Clay County November 3, 1906.

(n) Deed from S. E. Cover and others to defendant, dated May 17, 1906, registered in Clay County July 8, 1909, in Book P, page 221.

It is admitted that these conveyances cover the lands set out in the boundary claimed by the plaintiff, but by other tract numbers and grant numbers and described by metes and bounds and the numbers set out in the K. Elias deed.

(o) Defendants also introduced State grants No. 2328 to G. W. Bristol, dated December 20, 1860, for entry No. 2302, regis-
73 tered in Clay County, June 12, 1862, containing 790 acres, and grant No. 2325 to George Bristol, dated December 20, 1860, registered in Clay County June 26, 1862, and mesne conveyances bringing title into W. C. Walsh, all of record in Clay County, which is admitted to be located as shown on the map.

At the close of the evidence the defendant asked the court to direct a verdict in its favor upon the issues, which motion was granted; to the granting of this motion plaintiff excepted, and judgment was entered accordingly. The plaintiff sued out a writ of error, upon which the case comes to this court.

PRITCHARD, Circuit Judge:

In the determination of the questions involved in this controversy the plaintiff in error will be referred to as the plaintiff, and the defendant in error as the defendant, inasmuch as the parties sustain the same relation in this court that they did in the court below.

It is contended by the defendant that grant No. 3110, which embraces the 5,000 acres involved in this controversy, is invalid on account of certain irregularities as respects the entry, survey, etc. It was admitted in the court below that the sixteen grants, under which the defendant claims, embrace the lands sought to be recovered. We have carefully considered this point and are of the opinion that it is immaterial as to whether the 5,000-acre grant, made to Olmstead, under which the Government originally claimed, was valid or not, inasmuch as it is admitted that the grants made to Olmstead and upon which the defendant relies embrace this 5,000-acre tract and as it appears that at the time Olmstead conveyed the land in dispute to Stevens he had acquired title thereto under the sixteen grants to which we have heretofore referred.

The questions at issue in this controversy are within a narrow compass, and in order that we may fully understand the vital points it should be borne in mind that Olmstead, the common source through whom the plaintiff and the defendant both claim title, in 1868 made a deed to Levi Stevens which the plaintiff insists embraces the land in controversy.

74 The execution of this deed was acknowledged before John S. Hollingshead, of Washington, D. C., commissioner of deeds for the State of North Carolina, February 7, 1868. The deed from Stevens to the United States was acknowledged before Charles Chauncey, of Pennsylvania, commissioner of deeds for the State of North Carolina, March 15, 1869. The Olmstead deed was first registered in Clay County February 23, 1869, but it does not appear that it was properly probated and ordered to be registered. The same deed was reregistered in the same county on May 20, 1896. The deed from Stevens to the United States was registered in Cherokee County August 4, 1871, but it does not appear that this deed was properly probated and ordered to be registered. This deed was reregistered in this county May 14, 1896.

As shown by the statement of facts, the defendant bases its claim of title upon a deed made by K. Elias, commissioner, to A. Rosenthal, pursuant to a proceeding instituted at the spring term, 1882, of the Superior Court of Macon County by George W. Swepson against E. B. Olmstead, in which it was alleged that on the first day of October, 1867, the plaintiff was seized of the equitable title to the lands described in Exhibit "A," attached to and made a part of the complaint, and that at that time the legal title was in the State of North Carolina; that the plaintiff had paid the State of North Carolina the purchase-money for the same and that the defendant had contracted with the plaintiff for all of said lands, amounting to 85,000 acres, and that the plaintiff had assigned his equitable title to the defendant to enable him to obtain the grant in his (defendant's name) with the express and distinct understanding that the defendant was to reconvey to the plaintiff such portion of the land for which he did not pay. The plaintiff prayed that the defendant be declared a trustee of said lands for the benefit of plaintiff and that a commissioner be appointed to sell the same and out of the proceeds of such sale the defendant be paid the sum of $500.00, due him by the plaintiff, and the costs of the action.

The case was heard upon the complaint, proofs, and exhibits,
75 and the jury returned a verdict in favor of the plaintiff, and a sale of the lands was decreed and K. Elias was appointed commissioner to make such sale. Accordingly, a sale of the lands was had and A. Rosenthal became the purchaser of the same in the sum of $40,000. The commissioner reported the sale, that the amount had been paid, and his report was confirmed, and, in pursuance of the decree confirming his report, he executed a deed to Rosenthal for the same. The deed thus obtained from K. Elias, commissioner, was properly registered in Clay County October 17, 1890, six years prior to the second registration of the deed from Olmstead to Stevens, and also six years prior to the reregistration of the deed from Stevens to the plaintiff.

The objection that is urged as to the registration of the deed from Olmstead to Stevens in the first instance also applies to the registration of the deed from Stevens to the plaintiff—it being insisted by the defendant that the registration of these deeds was invalid. Therefore, if we should reach the conclusion that the registration of the deed from Olmstead to Stevens was valid it would necessarily follow that the registration of the deed from Stevens to the plaintiff was valid and the legal title to the lands in controversy would thereby vest in the plaintiff. Hence, the first question that arises is as to the effect of the registration of the deed from Stevens to the plaintiff in 1871. If this registration was not valid and no title passed thereby, then the question naturally arises as to whether such attempted registration was either actual or constructive notice to subsequent creditors or purchasers for value. If we should determine this question in the negative, it would necessarily follow that the plaintiff would not be entitled to recover. This being an action of ejectment,

the plaintiff must recover, if at all, upon the strength of its own title and not upon the weakness of its adversary's title.

What was the effect of the registration of these two deeds? It is insisted by counsel for the defendant that inasmuch as these deeds were not probated by the judge of probate the register of deeds was not authorized to place the same upon the record. Counsel for plaintiff cite certain cases bearing upon this question, but those
76 cases have no reference to the requirements of the act of 1868. While it is true that prior to 1868 the statute did not require that a probate taken by a commissioner of deeds out of the State should be adjudged to be correct, yet there can be no question that by the act of 1868 an adjudication was required and is essential. While it appears that these deeds were placed upon the record of the register of deeds in the respective counties, yet it nowhere appears that the same were properly probated by the clerk or other proper official or that the register of deeds was directed to register the same. This question has been passed upon by the Supreme Court of North Carolina, and that court has uniformly held that the register of deeds is without authority to place a deed on the registration books unless it has been duly probated by one of the judges of the Supreme Court, Superior Court, or the clerk of the court or his deputy in the county where the land is situate. In the case of Cozad v. McAden, 150 N. C., 206, the court said:

"It has been uniformly held since the enactment of the statute controlling this matter in 1868, that when the acknowledgment of a deed or other instrument requiring registration has been taken before some official outside of the State, that, in order to a valid probate, the deed, with a proper certificate, should be presented to the resident clerk for approval, and there should be an express adjudication to that effect by the local officer."

In the case of Evans v. Etheridge et ux., 99 N. C., 43, it appears that on the second day of May, 1866, Etheridge and wife executed a deed in trust to W. T. Brinkley conveying to him the property therein mentioned and for the purposes named. This deed in trust was delivered to the register of deeds for Dare County and registered by him without the same having been probated. The court, in that case, in referring to this phase of the question, said:

"It is insisted by the appellees that the deed in question was proved in compliance with this section before a commissioner of affidavits, and that the adjudication of the clerk is only directory and not an essential prerequisite to registration, and that, having been
77 registered upon the certificate of the commissioner, though without any adjudication and order of registration by the clerk it is valid, and the purposes of registration being to give notice, the spirit and purpose of the law is fully met. We are referred to a number of cases (Young v. Jackson, 92 N. C., 144; Holmes v. Marshall, 72 N. C., 37, and other cases) in which it was held that, 'the provisions requiring the certificate of probate by the probate judge of a county other than that of registration to be passed upon

by the probate judge (the clerk) of the county of registration, is directory, and that a registration which has not been so passed upon is not void.' The analogy between those cases and that before us is lost in the fact that the functions of the clerk are broader than those of the commissioner. He not only takes the proof of acknowledgment, but adjudges the fact of 'due execution,' whereas the commissioner of affidavits and perhaps others only take and certify the acknowledgment or proof.

"'Probate of deed is taken' says Pearson, J., in Simmons v. Gholson, 5 Jones, 401, 'by hearing the evidence touching the execution; i. e., the testimony of witnesses or acknowledgement of the party, and from that evidence adjudging the fact of its execution.

"'Where the evidence is offered to the court the entire probate is taken by it, but where the agency of a commissioner is resorted to, a part of the probate, i. e., hearing the evidence, is taken by him and certified to the court, and thereupon the probate is perfected by an adjudication, that the certificate is in due form and that the fact of the execution of the deed is established by the evidence so certified.'

"In cases of probate before clerks who can both take the evidence and adjudicate the fact, it has been held that, though it ought not to be omitted, the fiat of the clerk of the county of registration is not an absolute prerequisite to a valid registration, but the validity of the registration in such cases rests upon the fact that there has been an adjudication of 'due execution' by an officer competent to both hear evidence and adjudicate.

"The register has no authority to put the deed upon his books unless proved and so adjudged in some one of the modes prescribed by the statute. 'The probate is his warrant for doing so,' and if registered without this warrant it does not create such an equity in the mortgage trustee as to affect creditors or subsequent purchasers for value.

"It was so adjudged in Todd v. Outlaw, 79 N. C., 235, and we refer to that case and the authorities there cited."

78 In that case the court held that inasmuch as the deed in trust from Etheridge and wife to Brinkley was registered without proper warrant such registration did not render it valid as against the plaintiff and his creditors. In the case of Bernhardt v. Brown, 122 N. C., 587, this doctrine was again announced by the Supreme Court of North Carolina.

An examination of the record discloses the fact that it was not contended by counsel for the plaintiff in the court below that the attempted registration of the deed from Olmstead to Stevens was sufficient to divest Olmstead of the legal title.

In view of the provisions of the statute and the construction that has been placed upon it by the Supreme Court of North Carolina, we are of the opinion that the registration of this deed was invalid and that the legal title did not pass thereby as against subsequent creditors and purchasers for value.

However, it is insisted by the plaintiff that Rosenthal took title to the sixteen tracts of land now owned by the defendant with constructive or actual notice that the land in question had been conveyed to Stevens and in turn by Stevens to the plaintiff. To support this contention our attention is called to what is known as the Connor act, contained in chapter 147 of the acts of 1885, sec. 1 of which is in the following language:

"That section one thousand two hundred and forty-five of the code be stricken out, and the following inserted in lieu thereof: No conveyance of land, nor contract to convey, or lease of land, for more than three years shall be valid to pass any property, as against creditors or purchasers, for a valuable consideration from the donor, bargainor, or lessor, but from the registration thereof within the county where the land lieth: Provided, however, that the provisions of this act shall not apply to contracts, leases, or deeds already executed, until the first day of January, 1886: Provided further, that no purchase from any such donor, bargainor, or lessor shall avail or pass title as against any unregistered deed executed prior to the first day of December, 1885, when the person or persons holding or
79 claiming under such unregistered deed shall be in the actual possession and enjoyment of such land, either in person, or by his, her, or their tenants, at the time of the execution of such second deed, or when the person or persons claiming under or taking such second deed, had at the time of taking or purchasing under such deed actual or constructive notice of such unregistered deed, or the claim of the person or persons holding or claiming thereunder."

It is obvious from the provisions of this act that at the time of its enactment the legislature realized that something had to be done in order that conveyances of this character might be put upon a more certain basis and thus remove all doubts as to the validity of titles, and thereby prevent litigation. It appears that in many instances parties had failed to register their deeds, some had not registered their deeds within the time allowed by law, and others had attempted to have them registered, but had failed to comply with the statute then in force relating to the registration of such instruments. Therefore this act was passed, requiring all unregistered deeds to be registered before the first day of January, 1886, and providing that only from the date of such registration should the legal title pass from the donor, bargainor, or lessor. The act adopts the language of the statute in force in that State prior thereto in regard to the registration of mortgages, its purpose being to place deeds in respect to their registration and its effect upon creditors and purchasers for value upon the same footing as mortgages. Therefore the decisions in regard to the registration of mortgages and its effect upon creditors and purchasers for value apply with equal force to the registration of deeds.

There are two provisos in this statute, the first being that the provision of the act should not apply to contracts, leases, or deeds already

executed until the first day of January, 1886, and the second that "* * * no purchase from any such donor, bargainor, or lessor shall avail or pass title as against any unregistered deed executed prior to the first day of December, 1885, when the person or persons holding or claiming under such unregistered deed shall be in the actual possession and enjoyment of such land, either in person
80 or by his, her, or their tenants at the time of the execution of such second deed, or when the person or persons claiming under or taking such second deed had at the time of taking or purchasing under such deed actual or constructive notice of such unregistered deed, or the claim of the person or persons holding or claiming thereunder."

For some reason the plaintiff failed to avail itself of the provisions of this act, by which it was given until the first day of January, 1886, to register its deed and thereby perfect its title. Therefore, we must determine as to whether the former registration of this deed served as either actual or constructive notice to Rosenthal and those claiming under him. In considering this act, it should be constantly borne in mind that the general rule incorporated therein is that no deed shall be valid as against creditors and purchasers for value except from the date of registration. Therefore, in our opinion as to all deeds theretofore and thereafter executed, the registration was essential as against creditors and purchasers for value. It is well settled in North Carolina that the registration of a deed or mortgage is not valid as against subsequent creditors and purchasers for value, upon the theory that it puts them upon notice, but because it divests the title of the grantor, leaving nothing to convey; hence nothing passes. If its registration is without authority of law, it has no such effect and is invalid as against purchasers for all purposes. The purpose of the act of 1885 was to remove all controversy as to what would constitute notice, either actual or constructive, and to make the registration the single essential act on the part of the grantee, without which his deed was ineffectual to convey any title as against creditors and purchasers for value. In the case of Collins v. Davis, 132 N. C., 109, Judge Connor, in speaking for the court, said:

"Hollingsworth took his deed with such notice as the possession and the registration of the mortgage from Leonard to Tyson and Davis to Collins gave him of the condition of the title. His honor was of the opinion that he purchased with notice, and therefore took subject to the incumbrances and equities of Davis. By the
81 failure to record the deed from Leonard to Davis, it was, under the provisions of chapter 149, Laws 1885, invalid as against Hollingsworth, who purchased for value. The proviso to said act saving the rights of persons in the actual possession of land applies only to deeds executed prior to December 1, 1885. In Maddox v. Arp, 114 N. C., 585, Shepherd, C. J., says: 'The present case not being within the proviso of the act actual notice of a prior unregistered con-

tract to convey cannot, in the absence of fraud, affect the rights of a subsequent purchaser for value whose deed is duly registered according to law.' It will be observed that the act of 1885 is an exact copy of section 1254 of the code, with the insertion of the words 'conveyance of land or contract to convey or lease,' etc., placing deeds upon the same basis in regard to registration as mortgages and deeds of trust; hence, as said by this court in Allen v. Bolen, 114 N. C., 560, 'thus applying to the registration of deeds the same rule applicable to the registration of mortgages.' Since the passage of the act of 1829, chapter 20, brought forward and incorporated in the code, sec. 1254, Reade, J., in Robinson v. Willoughby, 70 N. C., 358, says: 'The decisions have been uniform that deeds in trust and mortgages are of no validity whatever as against purchasers for value, and creditors, unless they are registered, and that they take effect only from and after registration, just as if they had been executed then and there. * * * No notice, however full and formal, will supply the want of registration.' In Hooker v. Nichols, 116 N. C., 157, Faircloth, C. J., quoting the language of chapter 147 of the acts of 1885, says: 'It will be noted that the effective words of this act are identical in substance with section 1254 of the code, and we are driven to the conclusion that the legislature, with full knowledge of the meaning and effect of said act of 1829, intended to apply the same rule to all conveyances of land, as declared in the late act of 1885, and we must give the same effect to it.'"

The same rule is announced in Tremaine v. Williams, 144 N. C., 145, in which the court said:

"No notice to purchasers, however full and formal, will supply the want of registration."

Citing Quinnerly v. Quinnerly, 114 N. C., p. 144, in which Chief Justice Clark announced the same rule.

It is also insisted that Rosenthal had actual notice of the transfer of this land from Olmstead to Stevens and by Stevens
82 to the United States by virtue of the following statement contained in the complaint filed in the case of Swepson v. Olmstead, supra, it being the proceeding wherein the lands in controversy were decreed to be sold and in pursuance of which Rosenthal purchased the land and took his deed:

"That the defendant failed to pay for all of such lands except thirty-two thousand acres, for the said thirty-two thousand acres of land he did pay for, which are situated in Stecoah Township, in the county of Graham, No. Ca., and which were conveyed (as plaintiff is informed) by defendant to the Government of the United States."

It is also further insisted that the publication of notice of sale of these lands by the plaintiff in the News and Observer, a daily paper of that State, wherein a description of the same was contained, was notice to Rosenthal and Swepson, it appearing from the statement of the editor of that paper that "to the best of his knowledge and

belief" Mr. Swepson was a subscriber. We are of opinion that the cases to which we have referred effectually dispose of this point. However, if the rule were otherwise, we do not think the reference contained in the proceeding to which we refer would be sufficient to put Rosenthal on notice as to the claim of the defendant. If he had undertaken to investigate the matter, he certainly could not have ascertained anything definite from the reference made therein. By an examination of the records of Graham County he could not have found any deed conveying these lands either to Stevens or to the plaintiff, because neither of the deeds were registered in that county. If he had gone to Stecoah Township, in Graham County, he could not have located the same in accordance with the description contained in the complaint filed in the proceeding by virtue of which he became purchaser of these lands for value. Nor do we think that the evidence as respects the publication of notice in the News and Observer would be sufficient to bring this case within the rule for which plaintiff contends. These circumstances are entirely too vague, uncertain, and indefinite to serve as notice under the law and
83 decisions of the Supreme Court of North Carolina on this subject. In the case of Hinton v. Leigh, 102 N. C., p. 28, the court, in referring to the question of notice, said:

"The mere fact that the trustee of the deed of trust, and the purchasers for a valuable consideration claiming under it, and creditors, may, at the time of its registration, have had notice, however clear, of the prior unregistered mortgage, could not at all prejudice them. This is well settled by numerous adjudications of this court. It would be otherwise, however, as to such creditors or purchasers who should fraudulently prevent or delay the registration of the prior mortgage or deed of trust."

There is not the slightest intimation by counsel for the plaintiff that Rosenthal did or said anything that could be construed as an attempt on his part to fraudulently prevent or delay the registration of these deeds.

The Connor Act is eminently fair and at the time of its enactment afforded one whose deed was not properly registered an opportunity to have the same registered and thus perfect what may have otherwise been an imperfect title. The deeds under which plaintiff claims, as we have stated, had not been properly registered, but when this act was passed it was afforded an opportunity to have the same registered before the first day of January, 1886, but it failed to avail itself of the provisions of the act by not having the same registered until May, 1896. In the meantime Rosenthal, under whom the defendant claims by an unbroken chain, registered his deed in 1890, thus completely depriving the defendant of the right to perfect its title by registration in pursuance to the Connor Act.

Counsel for the plaintiff relies upon the case of Simmons Creek Coal Company v. Doran, 142 U. S., p. 417, to sustain its contention

as respects this point, and insists that the doctrine of caveat emptor applies to the case at bar. While we recognize the principle relied upon by the plaintiff, nevertheless, in view of the law of North Carolina, as construed by the supreme court of that State, we are of the opinion that the rule invoked does not apply.

84 The deed to Rosenthal having been registered prior to the registration of the deed from Olmstead to Stevens as well as the deed from Stevens to the United States, we are clearly of the opinion that Rosenthal thereby acquired the legal title to the lands in dispute.

However, it is also contended by counsel for the plaintiff that the subsequent re-probate and reregistration of these deeds relate to the first registration and that Stevens, after having reregistered his deed, thereby became vested with the legal title to the same. This question was expressly decided in the case of Bernhardt v. Brown, 122 N. C., 587, in which the court said:

"* * * The subsequent reprobate and reregistration in 1897, since the plaintiff's title accrued and since this action was brought, can have no effect. Acts 1885, chapter 147; Waters v. Crabtree, 105 N. C., 394."

The same principle is also announced in the cases of Phillips v. Hodges, 109 N. C., 248; Brown v. Hutchinson, 155 N. C., 205; Phifer v. Barnhardt, 88 N. C., 333.

It is also contended that the defendant did not derive title from Olmstead under the proceeding in the case of Swepson v. Olmstead, supra, for the reason that the certified copy of transcript of record fails to show that any summons was issued in that proceeding and served upon the defendant, and that the court, therefore, had no jurisdiction of the party defendant and that the judgment as to him is void. Further, that the defendant's title is defective in that under said proceeding there is no description of the land in question in the complaint nor in any other part of said proceeding. While it is true that the certified copy of the proceeding in the superior court, which was used as evidence in the trial in the court below, did not contain the summons, nevertheless the decree, among other things, contained the following recital:

"This cause coming on to be heard upon the complaint, proofs, exhibits, and verdict of the jury, and it appearing to the satis-
85 faction of the court that a writ of summons has been duly executed on defendant, and there is no defence made to this action * * *."

Thus it will be seen that the decree authorizing the sale of this land recites the fact that a writ of summons had been duly executed on the defendant, which obviated the necessity of producing the summons as the basis for that proceeding. The court, having found as a fact that the summons was duly executed and returned, necessarily shows that the summons had been issued.

As to the next point, to wit, that there was no description of the lands involved in that controversy, we call attention to the fact that the decree also contains the following:

"* * * Ordered, adjudged, and decreed by the court that the plaintiff have and recover judgment of the defendant the lands mentioned in his complaint and marked 'Exhibit A,' amounting to eighty-nine thousand five hundred and thirty-two acres of land."

Also the third paragraph of the complaint in that case is in the following language:

"That the defendant advanced to the plaintiff the sum of $500.00, which sum was to be paid out of the sales of these lands when sold by plaintiff; and defendant, in pursuance of the aforesaid agreement, obtained in his own name State grants for the said lands which are described in Exhibit 'A,' and hereto attached and made a part of this complaint."

Thus it will be seen that there was a statement in the complaint to the effect that a full and complete description of the lands involved in that controversy was contained in Exhibit "A," which was attached to and made a part of the complaint filed therein. This, taken in connection with the further fact that the decree authorizing the sale of the lands refers to them as being described in Exhibit "A," is sufficient to show that there was a full and complete description of said land in the complaint and exhibit filed therewith. It also appears that the commissioner executed a deed to Olmstead
86 in accordance with the decree in which, among other things, is recited the authority of the decree, the sale of the land thereunder, his report and final decree confirming the same, and then proceeds to convey these lands by metes and bounds as set out in Exhibit "A." It further appears that subsequent thereto Olmstead and his wife executed a quit-claim deed which was delivered to Elias, commissioner, thus recognizing and approving the proceeding to the fullest extent. The Superior Court being a court of general jurisdiction, its decrees and judgments import verity, and, it appearing in the decree authorizing the sale of these lands that a summons was served upon the defendant, and it further appearing that the complaint referred to Exhibit "A," attached thereto, which contained a description of the grants included in the deed from Elias, commissioner, to Rosenthal, we think it sufficiently appears that the proceeding was regular, and, therefore, under the circumstances, not subject to collateral attack.

But it is further contended that if there be any defect in the registration of the Olmstead and Stevens deeds, on account of failure to comply with the requirements of the law in force at that time, that the same is cured by the provisions of chapter 32, of the Laws of North Carolina, 1869–70, ratified January 28, 1870, which are in the following language:

"* * * That the probate of all deeds and other instruments required to be registered, heretofore taken under laws existing prior to the adoption of the Code of Civil Procedure, is hereby declared to be valid to all intents and purposes and shall be admitted to registration as if the probate had been taken under existing laws."

Apparently realizing that many deeds had been executed, proved, and registered in a manner not fully meeting the requirements of the law, the legislature, by the acts of 1876–77, ratified December 12, 1876, provided as follows:

"That all deeds and other instruments of writing, allowed of (or)
required to be registered, which have been heretofore proved
87 or acknowledged, and the private examination taken of femes
covert, if any, executing the same, and certified according to the then existing law, but not registered, shall, with such certificate, be registered by the register of the proper county, upon payment to the judge of probate of such county, or other officer authorized by law to admit such deed to probate for such register, the registration fees as prescribed by law, and presentation of such deeds or other instruments of writing, with such certificate to such register for registration, at any time within two (2) years from and after the ratification of this act, and the registration of such deeds and other instruments of writing, herein provided for, as well as the registration of all deeds and other instruments of writing, allowed or required to be registered, which have been heretofore registered, but not by or within the time required by law, shall be as valid and effectual in law as if the same had been before duly registered in all respects according to law: Provided, that this act shall not apply to deeds of trust, mortgages, or marriage settlements."

There is nothing contained in the foregoing that could be construed to relate to the defects alleged as respects the probate of these deeds. In this instance there was no probate at all. Therefore, it cannot be said that this act, which undertakes to cure defective probates, can have any relation to instruments attempted to be registered in the manner these were. For that reason we do not think this act applies to the case at bar.

We have carefully considered the various cases relied upon by counsel for the Government, but are of the opinion that, for the reasons hereinbefore stated, they do not apply to the case at bar. There are various assignments of error, but owing to the conclusion we have reached as to the crucial points in this case, we do not deem it necessary to discuss the same. After a careful consideration of the facts and the law governing this case, we are of the opinion that the rulings of the learned judge who presided in the court below were proper, and, therefore, the judgment of that court should be affirmed.

Affirmed.

88

89 On the same day, to wit, Dec. 21, 1912, the court made and entered the following judgment, to wit:

Judgment.

Filed and entered Dec. 21, 1912.

United States Circuit Court of Appeals, Fourth Circuit.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
THE HIAWASSEE LUMBER COMPANY, DEFENDANT IN ERROR. } No. 1102.

In error to the District Court of the United States for the Western District of North Carolina.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

December 21, 1912.

J. C. PRITCHARD.

Afterwards, to wit, on Jan. 20, 1913, the mandate of this court in this cause was issued and transmitted to the said District Court of the United States for the Western District of North Carolina, at Asheville, in due form.

And afterwards, to wit, on Jan. 28, 1913, the original maps certified up and received on June 14, 1912, are returned to the clerk of the said District Court at Asheville, N. C.

Petition of plaintiff in error for a writ of error, and order allowing same.

Filed March 12, 1913.

90

91 United States Circuit Court of Appeals, Fourth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
THE HIAWASSEE LUMBER COMPANY, DEFENDANT IN ERROR. } No. 1102.

PETITION FOR WRIT OF ERROR.

Now comes the plaintiff in error, the United States of America, and says that on the 21st day of December, 1912, the United States Circuit Court of Appeals sitting at Richmond rendered final judg-

ment in the above-entitled cause against the plaintiff and in favor of the said defendant, and that in the record and proceedings aforesaid of the said United States Circuit Court of Appeals and in the rendition of the final judgment therein manifest errors were committed to the prejudice of the plaintiff in error, all of which will more fully appear in detail from the assignment of errors which is filed with this petition; that the value of the property, to wit, the land in controversy, exceeds forty thousand dollars.

Wherefore the plaintiff in error, the United States of America, prays that a writ of error issue in its behalf out of the United States Supreme Court for the correction of the errors so complained of, and that a transcript of the record, proceedings, papers, and final judgment in this case, duly authenticated, may be sent to the said Supreme Court of the United States.

Feb. 24, 1913.

A. E. HOLTON,
United States Attorney, Attorney for Plaintiff in Error.

Upon the foregoing petition and assignment of errors attached it is ordered that writ of error issue as prayed for in the petition.

March 12, 1913.

NATHAN GOFF,
Judge of the U. S. Circuit Court of Appeals,
Who sat in the above case.

92–93 *Assignments of error.*

Filed with petition for writ of error on March 12, 1913.

United States Circuit Court of Appeals, Fourth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
THE HIAWASSEE LUMBER COMPANY, DEFENDANT IN ERROR. } No. 1102.

Now comes the plaintiff in error, the United States of America, and says that, in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Fourth Circuit in the above-entitled cause and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of the said plaintiff in error in this, to wit:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States for the Western District of North Carolina in favor of said defendant in error and against the plaintiff in error.

Second. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States District Court aforesaid and in not remanding said cause to said District Court for a new trial.

Third. Said Circuit Court of Appeals erred in holding that the deed from E. B. Olmsted to Levi Stevens, executed February 7, 1868, and recorded by the register of deeds for Clay County, North Carolina, on February 23, 1869, did not divest said Olmsted of the legal title to the lands described in said deed.

Fourth. Said Circuit Court of Appeals erred in not holding that any defect in the record of the said deed from Olmsted to Stevens made by the recorder of deeds of Clay County, North Carolina, on February 23, 1869, was cured by chapter 32 of the Laws of North Carolina of 1869–70 and chapter 23 of the laws of 1876–77, ratified December 12, 1876.

94–95 Fifth. Said Circuit Court of Appeals erred in not holding that by virtue of the said deed from Olmsted to Stevens, and the subsequent deed executed March 15, 1869, by the said Stevens and wife in favor of the United States, the plaintiff in error became vested with the full legal title to the lands described in said deeds.

Sixth. Said Circuit Court of Appeals erred in not holding that the record of the said deed from Olmsted to Stevens made by the recorder of deeds of Clay County, North Carolina, on February 23, 1869, constituted notice to the defendant in error and its grantors of the fact that the said Olmsted had divested himself of the title to the lands described in said deed, within the meaning of chapter 147 of the laws of 1885 of the State of North Carolina.

Seventh. Said Circuit Court of Appeals erred in holding that the plaintiff in error, the United States of America, was bound to again record the deeds under which it claims within the period of limitations imposed by the said chapter 147 of the North Carolina Laws of 1885.

Eighth. Said Circuit Court of Appeals erred in not holding that such rights as the plaintiff in error had acquired under the said deeds from Olmsted to Stevens, and from the latter to the United States, could be in no way affected by any law of the legislature of the State of North Carolina thereafter enacted.

Ninth. Said Circuit Court of Appeals erred in not holding that A. Rosenthal, the purchaser at a sale ordered by the Superior Court of Macon County, North Carolina, in 1882, through whom the defendant in error claims to have derived title, had, at the time of his said purchase, actual notice of the transfer of the land involved in this cause from Olmstead to Stevens and from the latter to the United States.

Tenth. Said Circuit Court of Appeals erred in not holding that the proceedings in the Superior Court of Macon County, North Carolina, under which said Rosenthal became a purchaser, were invalid for want of proper description of the land in the petition therein filed, as a result of which said Rosenthal acquired no title whatever by his said purchase.

96–97 Eleventh. Said Circuit Court of Appeals erred in holding in any event that said Rosenthal was a purchaser without

notice within the meaning of said chapter 147 of the North Carolina Laws of 1885.

Twelfth. Said Circuit Court of Appeals erred in not holding that the said Rosenthal was put upon notice that the United States was the owner of the land in controversy by reason of the exception in the complaint in the proceedings in the Superior Court of Macon County of Geo. W. Swepson vs. E. B. Olmsted, under which the said Rosenthal claimed to be the purchaser, and through whom the defendant claims to have derived title, of 32,000 acres of land therein recited to have been conveyed by Olmsted to the United States, and thereby put upon notice within the meaning of chapter 147 of the North Carolina Laws of 1885.

Thirteenth. Said Circuit Court of Appeals erred in not holding that the defendant in error, The Hiawassee Lumber Company, had, at the time of its purchase of the lands involved in this cause, to wit, May 17, 1906, notice of the claims of the plaintiff in error to said land, and was therefore bound to inquire into the bona fides of its grantors' purchases.

Fourteenth. Said Circuit Court of Appeals erred in sustaining the ruling of the trial judge in directing a verdict for the defendant by directing the jury to answer the first issue in the negative.

Wherefore, the United States of America, plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above-entitled cause, to the prejudice of the plaintiff in error, the said judgment of the said United States Circuit Court of Appeals be reversed, annulled, and held for naught, and that said cause be remanded to the United States District Court for the Western District of North Carolina, with instructions to grant a new trial in such cause, or for such further proceedings in said cause as may be determined upon by this honorable court, to the end that justice may be done in the premises.

A. E. HOLTON,
United States Attorney, Attorney for Plaintiff in Error.

98–99 *Writ of error.*

Issued March 12, 1913.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the United States Circuit Court of Appeals, Fourth Circuit, at Richmond, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said U. S. Circuit Court of Appeals, 4th Circuit, before you, or some of you, between The United States of America, plaintiff, and the Hiawassee Lumber Co., defendant, a manifest error hath happened, to the great damage of the said

The United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Edward D. White, Chief Justice of the United States, the twelfth day of March, in the year of our Lord one thousand nine hundred and thirteen.

[SEAL.] HENRY T. MELONEY,
Clerk of the United States Circuit Court of Appeals, 4th Circuit.

Allowed by—
NATHAN GOFF,
Judge of the United States Court of Appeals, Fourth Circuit.

100 The foregoing writ of error is served by lodging a copy thereof for the adverse party in the clerk's office of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, where the record remains, on the 8th day of March, 1913,

HENRY T. MELONEY, *Clerk.*

101 Original.

Citation.

Issued March 12, 1913.

UNITED STATES OF AMERICA, *ss:*

To the Hiawassee Lumber Co., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States Circuit Court of Appeals, Fourth Circuit, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this twelfth day of March, in the year of our Lord one thousand nine hundred and thirteen.

NATHAN GOFF,
Judge of the United States Circuit Court of Appeals,
Fourth Circuit.

102 On this eighteenth day of March, in the year of our Lord one thousand nine hundred and thirteen, personally appeared John W. McElroy before me, the subscriber, and makes oath that he delivered a true copy of the within citation to James H. Merriman, attorney for the Hiawassee Lumber Company.

WM. E. LOGAN, *U. S. Marshal.*
By JOHN W. MCELROY, *Deputy Marshal.*

Sworn to and subscribed the 18 day of March, A. D. 1913.
[SEAL.]
W. S. HYAMS,
Deputy Clerk U. S. District Court.

103 And thereupon it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the Supreme Court of the United States, and the same is transmitted accordingly.

Teste:
[SEAL.] HENRY T. MELONEY, *Clerk.*

Clerk's certificate.

UNITED STATES OF AMERICA, *ss:*

I, Henry T. Meloney, clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true transcript of the record and proceedings in the therein-entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 18 day of March, A. D. 1913.

[SEAL.]
HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

104

(Indorsement on cover:) File No. 23603. U. S. Circuit Court of Appeals, 4th Circuit. Term No. 1028. The United States, plaintiff in error, vs. The Hiawassee Lumber Company. Filed March 27th, 1913. File No. 23603.

○

INDEX.

CITATIONS.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
THE HIAWASSEE LUMBER COMPANY. } No. 133.

WRIT OF ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

[Opinion of court below, R., 55; 202 Fed., 35.]

This was an action of ejectment brought for the purpose of trying the title to 5,000 acres of land situate in Clay County, North Carolina. The District Court, after sustaining various objections to the evidence offered by the Government and overruling its requests for instructions, directed a verdict and entered a judgment for the defendant. The judgment was affirmed by the Circuit Court of Appeals, whose opinion will be found in the record at page 55, and in 202 Fed., page 35.

Before entering upon a particular consideration of the record and assignments of error, it will be

well to take a general survey of the situation out of which the controversy grew. On November 10, 1867, one E. B. Olmsted obtained from the State of North Carolina a large number of grants, seventeen of which were put in evidence by the Government. One of these, numbered 3110, conveyed the 5,000 acres in dispute by specific description. The other sixteen covered 640 acres each, and, although the relations of their respective boundary calls do not appear from the present record, it is conceded on both sides that, collectively, they also embraced the entire *locus in quo*.

On February 7, 1868, Olmsted, being thus invested with full legal title by the conveyances of the State, conveyed the 5,000 acres in fee to one Levi Stevens by a general warranty deed (R., 8) wherein the land was specifically described. According to the recitals both grantor and grantee were residents of the city of Washington, D. C. The deed was executed and acknowledged at that place before a commissioner of the State of North Carolina, who was duly empowered by her laws to act in that behalf, and was then and there certified by him in the usual and proper manner (R., 9).

On February 23, 1869, this ancient conveyance was actually recorded in the office of the register of Clay County. This appears by the certificate of the register (R., 10) and is not disputed.

The same deed had been in like manner recorded on December 14, 1868, in the registry of Cherokee

County (R., 10) within which the lands were included before Clay County was created.

On May 20, 1896, it was registered for the second time in Clay County, upon a formal order of the clerk of the Superior Court adjudging it to be "in due form and according to law" (R., 10).

On March 15, 1869, Stevens, the grantee of Olmsted, in consideration of $40,500, conveyed with warranty to the United States 45 described parcels of land aggregating 32,483 acres, referred to as lands granted to Olmsted by the State November 10, 1867 (R., 17). Among these is the parcel in controversy, particularly described as before. The record shows that this conveyance was accepted by the Government in settlement of a shortage of more than $80,000.00, for which Olmsted (who had been a disbursing clerk in the Post Office Department) and his sureties were being sued (R., 20).

This conveyance from Stevens to the United States was duly executed and acknowledged before and certified by a commissioner for the State of North Carolina, acting pursuant to her laws, in the State of Pennsylvania. It was recorded in the registry of Cherokee County August 4, 1871, in that of Graham County on May 14, 1896 (R., 19), and in that of Clay County on May 22, 1896 (R., 20), the certificates indorsed upon it showing affirmatively that in the last two instances there had been formal adjudications of "due form" and orders for registration by

the respective clerks of the superior courts of the counties of registration.

Having thus described the chain of title relied on by the Government, we will now turn our attention to the acts and proceedings which are opposed to it by the defense.

In 1882, one G. W. Swepson, through his attorney, K. Elias, filed a complaint against Olmsted, as sole defendant, in the Superior Court for Macon County. The complaint is as follows:

> The plaintiff alleges:
>
> I. That on the 1st day of October, 1867, he, the plaintiff, was seized of the equitable title to the lands hereinafter described, and the legal title was in the State of North Carolina, although plaintiff had paid the State of North Carolina the purchase money for the same; and that the defendant contracted with the plaintiff for all of said lands amounting to eighty-nine thousand five hundred and thirty-two (89,532) acres, and plaintiff assigned his equitable title to the said defendant to enable said defendant to obtain the State grants in his (defendant's) name, with the expressed and distinct understanding that defendant was to recover to the plaintiff such number of acres of land that he did not pay for.
>
> II. That the defendant failed to pay for all of such lands, except thirty-two thousand (32,000) acres, for the said number of thirty-two thousand acres of land he did

pay for, which are situated in Stecoah Township, in the County of Graham, No. Ca., and which were conveyed (as plaintiff is informed) by defendant to the Government of the United States.

III. That the defendant advanced to the plaintiff the sum of five hundred dollars, which sum was to be paid out of the [41] sales of these lands when sold by plaintiff; and that defendant, in pursuance of the aforesaid agreement, obtained in his own name State grants for the said lands which are described in Exhibit "A" and hereto attached and made part of this complaint.

Wherefore, plaintiff demands judgment.

1st. That plaintiff [defendant] is declared a trustee of said lands for the benefit of plaintiff, and that he be compelled, either in his own proper person or by a commissioner appointed on the part of the court, to sell said lands and make title to the purchaser or purchasers, and out of the proceeds of said sale the defendant to be paid the sum of five hundred dollars due him by plaintiff, and also the costs of this action and all other costs and expenses growing out of this action or incurred by the same (R., 23).

There was a decree (R., 24) reciting service on Olmsted and that "there is no defense made to this action," and adjudging that Swepson recover the entire 89,532 acres, holding Olmsted as Swepson's trustee, subject to a lien in favor of the former for $500 owed him by the lat-

ter and directing that all the land be sold. This decree appointed K. Elias, the plaintiff's attorney, as a commissioner, to make the sale and convey to the purchaser, and required him out of the moneys realized to pay Olmsted the $500, discharge the costs, including the allowance for his services as commissioner, and account for the residue to the plaintiff. Neither the complaint nor the decree describes the lands affected. Both refer for this purpose to an exhibit alleged to have been attached to the complaint, which has since disappeared.

Later in the same year, 1882, Elias reported that he had sold *all* of the lands mentioned in the decree to A. Rosenthal. Thereupon a final decree was entered (R., 26) confirming the sale and directing Elias to convey "the lands aforesaid" to Rosenthal, "and upon the payment of the residue of the money due the plaintiff out of the sale of the said lands that he retain five per centum of the amount as compensation, and the balance to pay to the plaintiff herein" (R., 26).

These proceedings were followed by a deed from Elias to Rosenthal, which appears at page 27 of the record. This deed, reciting prior proceedings and the payment of $40,000 to Elias, purports to convey land situate in Cherokee, Macon, Swain, and Jackson Counties, describing by metes and bounds about ninety different grants, including the sixteen smaller grants to which we have referred above. It makes no mention of Clay County.

Although executed on October 28, 1882, it was not registered in Clay County until October 17, 1890, about eight years later (R., 27).

To clarify the situation as we unfold it, we may properly explain at this point that (excepting a quitclaim from Swepson's widow, which, as we shall see, can not help the defendant) this deed to Rosenthal is the only deed in the defendant's chain of title which was registered in Clay County before the *second registrations* (in 1896) of the two ancient conveyances relied on by the Government. Stated in a word, the defendant's case rests upon the following propositions: That the registration of the deed from Olmsted to Stevens in 1869 was invalid because of a failure to observe a technical requirement of the registration laws then in force; that Rosenthal was a *bona fide* purchaser for value without notice, actual or constructive, of the Government's rights; and that, therefore, his deed (registered in 1890) cuts out the Government's deeds which, it is said, were not registered at all, in legal contemplation, until 1896.

By a deed dated three days after the deed to Rosenthal, viz, October 31, 1882, but not registered until November 12, 1906, Olmsted quitclaimed to Rosenthal the same lands (R., 27).

Swepson died March 7, 1883, heavily indebted, leaving a will appointing his widow as sole executrix and devising all his property to her (R., 29). In a proceeding before the Superior Court of Alamance County she was authorized to sell

his real estate, whether held by legal or equitable title, situate in nine specified counties, including the county of Cherokee but not the county of Clay, and to apply the proceeds to the expenses of administration and payment of debts (R., 29 *et seq.*).

It appears by the proceedings that many tracts of land were inventoried and sold under this authority, and that one R. Y. McAden purchased nearly all of them (R., 37). One lot of these lands so sold included 131 tracts, and among them the sixteen 640-acre grants to which we have particularly referred. The lot was described in the report of the executrix as follows:

> Lot No. 53. Interest of Geo. W. Swepson, deceased, in 131 tracts of land in Cherokee County, to wit—

giving the respective grant numbers. The record (38) states:

> In the report of the sale by the executor it appears that these same grant numbers referred to in the deed from Kope Elias to A. Rosenthal are embraced and included by the grant numbers and acreage and it is conceded that these cover the land claimed by the plaintiff.

The executrix, under the authority above mentioned, attempted to convey to McAden by a deed dated May 11, 1888, which was registered in Clay County June 28th of that year. It recited

a consideration of $3,769 for the 131 tracts (R., 38).

R. Y. McAden, by will dated April 9, 1889, devised to J. H. McAden, with power to sell (*id.*).

On May 21, 1889, Rosenthal and his wife made a deed as follows (R., 28):

> STATE OF NORTH CAROLINA,
>
> *Alamance County:*
>
> Whereas Kope Elias, commissioner of the Superior Court of Macon County, North Carolina, did convey to A. Rosenthal, of Alamance County, aforesaid, by deed dated October 28, 1882, certain tracts of land in the said deed fully described (to which reference is made for a more particular description), containing in the aggregate about 89,532 acres, lying and being in the counties of Cherokee, Macon, Jackson, and Swain Counties, aforesaid State, the said lands being known as the Olmsted grants; and whereas, by deed dated October 31st, 1882, E. B. Olmsted and wife, of the State of New York, did release and quitclaim to A. Rosenthal, the lands in the counties aforesaid known as the Olmsted grants, which are fully described in his deed aforesaid, dated October 31st, 1882, to which reference is made.
>
> Now, *in order to carry out the purposes for which said deeds were made,* we, A. Rosenthal and wife, Henrietta Rosenthal, of Alamance County, North Carolina, for certain good and valuable considerations, do hereby convey, release, grant, confirm, and

quitclaim to *John H. McAden* and his heirs all the lands which were conveyed to said A. Rosenthal by Kope Elias, commissioner, and E. B. Olmsted by their aforesaid deeds, and which are therein fully described, to have and to hold the premises, with all the rights, privileges, and appurtenances thereto in any way belonging to him, the said John H. McAden, and his heirs *in trust for the heirs and devisees of Rufus Z. McAden,* late of Mecklenburg County, State aforesaid, and upon the same conditions and limitations as are by the will of Rufus Z. McAden put upon other lands, with full power to sell and dispose of said lands for the benefit of the estate of said R. Z. McAden, and to convey the same in fee simple just as he is by said will authorized to do as to the other lands of said R. Z. McAden. Henrietta Rosenthal, wife of A. Rosenthal, joins her husband in the execution of this deed in token of her assent thereto, and of her renunciation of all claims of dower or homestead therein.

In witness whereof, A. Rosenthal and his wife have hereto set their hands and seals this 21st day of May, 1889.

A. ROSENTHAL. [SEAL.]
HENRIETTA ROSENTHAL. [SEAL.]

Witness:
E. M. COOK.

This deed was not registered in Clay County until May 12, 1906 (*id*).

The Government contends that this instrument, especially when read in connection with the action

of the executrix, the probate court, and the purchaser at her sale, in assuming that the land belonged to Swepson, shows conclusively that the purpose of the deed from Elias to Rosenthal was to put the title in the latter as Swepson's trustee and that Rosenthal was not a purchaser for value.

The Government proved by the testimony of one G. Rosenthal (R., 39) that A. Rosenthal, his brother, came to North Carolina in 1880, when at the age of 46 years, and entered the employment of G. W. Swepson in a general merchandise store at Alamance; that he was not a man of means, and was furnished the money to defray the traveling expenses; that he remained in the employ of Swepson until 1888, at a salary of $75 a month; that he owned no property; that he had never been in the western part of the State where these lands are situate; and that he was dead at the time of the trial.

In February, 1905, Henry M. McAden and others, described in the record as children and devisees of R. Y. McAden, made a deed to one S. E. Cover and others, which was registered in Clay County November 3, 1906 (R., 38).

On May 17, 1906, Cover and others made a deed to the defendant company which was registered in Clay County July 8, 1909 (R., 38). These conveyances covered the lands in controversy, describing them by tract and grant numbers, and by metes and bounds, as in the Kope Elias deed.

Proceedings in the courts below.

The Government's evidence consisted of the following:

The 5,000-acre grant to Olmsted, dated November 10, 1867 (R., 14).

The 16 smaller grants to Olmsted of the same date (R., 21).

The warranty deed from Olmsted to Stevens for the land in controversy (R., 8, 17).

The deed from Stevens to the United States conveying, as has been stated, more than 32,000 acres, including the 5,000-acre tract (R., 17, 22).

The trial court admitted the deeds under the registrations of 1896 but held the earlier registrations invalid because it did not affirmatively appear that they had been formally ordered by the clerk of the court in Clay County (R., 12).

It was admitted that there was sufficient evidence to go to the jury on the question of location (R., 22).

To meet the plaintiff's case the defendant introduced:

The deed from K. Elias, commissioner, to A. Rosenthal, dated October 28, 1882, registered October 17, 1890 (R., 27), and the record of the other proceedings in the case of *Swepson* v. *Olmsted* (R., 23, 26–28).

The quitclaim deed from Olmsted to Rosenthal dated October 31, 1882, and registered November 12, 1906 (R., 27).

The deed from Rosenthal to John H. McAden dated May 21, 1889, and registered May 12, 1906 (R., 28).

The deed from Mrs. Swepson to R. Z. (Y.) McAden dated May 11, 1888, and registered June 28, 1888 (R., 38).

The will of R. Y. McAden dated April 9, 1889 (R., 38).

The deed from Henry M. McAden and others, children and devisees of R. Y. McAden, to S. E. Cover and others, dated February, 1905, and registered November 3, 1906 (R., 38).

The deed from Cover and others to the defendant company dated May 17, 1906, and registered July 8, 1909 (R., 38).

In rebuttal the Government produced the testimony of G. Rosenthal (R., 39), to which we have already referred, and certain other evidence not material to be considered here.

At the close of the case the district judge, overruling numerous requests for instructions submitted by the plaintiff (R., 43), granted the defendant's motion for a directed verdict (R., 42). Judgment was entered accordingly (R., 5).

The case was carried to the Circuit Court of Appeals upon a number of assignments of error based on exceptions taken at the trial (R., 47) which served to present the two questions whether the trial court was right in holding absolutely void the early registrations of the deeds constituting the Government's title, and whether it properly

directed the verdict for the defendant. As relevant to the latter question the defendant argued that the particular grant (No. 3110) mentioned in the Government's deeds was invalid for certain alleged irregularities, and advanced the proposition that the Government's title must stand or fall with that grant. This proposition was rejected for reasons which will appear in the following quotation from the opinion (R., 59):

> It is contended by the defendant that grant No. 3110, which embraces the 5,000 acres involved in this controversy, is invalid on account of certain irregularities as respects the entry, survey, etc. It was admitted in the court below that the sixteen grants, under which the defendant claims, embraced the lands sought to be recovered. We have carefully considered this point and are of the opinion that it is immaterial as to whether the 5,000-acre grant, made to Olmsted, under which the Government originally claimed, was valid or not, inasmuch as it is admitted that the grants made to Olmsted and upon which the defendant relies embrace this 5,000-acre tract and as it appears that at the time Olmsted conveyed the land in dispute to Stevens he had acquired title thereto under the sixteen grants to which we have heretofore referred.

The court, however, was of the opinion that the early registrations were invalid because it was not affirmatively shown that the deeds had been submitted to the clerk of the Superior Court and

ex officio probate judge of Clay County for a formal order preliminary to the actual registration. It further held that certain curative statutes mentioned in the opinion were inapplicable; that the registrations in 1869 constituted no notice to a second puchaser from Olmsted; that in the absence of valid registration no notice, however full and complete, could operate to preclude Rosenthal from acquiring a valid title by the registration of his deed in 1890; that by the law of 1885, known as the Connor Act, which materially changed the law previously governing the registration of deeds, the United States was given until January 1, 1886, to register its deeds, and that, having failed to register them until 1896, and Rosenthal in the meantime (1890) having registered the deed given him in 1882 by Kope Elias, the commissioner, the United States was thereby completely deprived of the right to perfect its title by re-registration under the Connor Act.

ASSIGNMENTS OF ERROR.

The points raised by the assignments (R., 71) which we shall ask this court to consider are, in brief:

(1) Whether the early registrations of our deeds, particularly that of the Olmsted-Stevens deed, which occurred in Clay County, February 23, 1869, was invalid.

(2) Whether any conveyance in the defendant's line of title, which was registered in that county

before the Government's deeds were registered there in 1896, can be regarded as a conveyance to a *bona fide* purchaser for a valuable consideration, without actual or constructive notice, within the meaning of the " Connor Act."

ARGUMENT.

I.

General discussion of the questions involved.

The case was diagnosed by the court below, and we shall consider it here, as depending for its solution upon two fundamental inquiries. The first respects the technical sufficiency of the early registration of the two deeds leading from Olmsted to the Government. This inquiry may more appropriately be confined to the deed from Olmsted to Stevens, rather than the deed from Stevens to the United States, as was done in the court's opinion, since the former was not only the first in time execution, but was *actually* registered in the proper county February 23, 1869, whereas the series of conveyances upon which the defendant relies had its inception as late as 1882.

The second fundamental inquiry is directed to the question whether A. Rosenthal was a purchaser *for a valuable consideration,* and a purchaser *without " actual or constructive notice,"* within the meaning of the act of 1885, ch. 147, § 1 (Code, § 1245; Pell's Revisal, 980), commonly known as the Connor Act.

If the registration of 1869 was not absolutely void, as held by the court below, but substantially in accord with the law of that time, or if any defects in it were cured by presumption or by legislation, the Government's title was, of course, fully protected. And again, if Rosenthal was not of the class of purchasers whom the Connor Act was designed to protect, the defense must fail completely, since the deed to him is the only one in the defendant's chain leading from Olmsted which was placed on record before the Government's deeds were registered for the second time (in 1896) with every possible formality.

Before entering upon these two inquiries in detail it may be of assistance to discuss the purpose of the Connor Act and its relation to the earlier law concerning conveyances of real property. The first section of that act is as follows:

> No conveyance of land, nor contract to convey, or lease of land, for more than three years shall be valid to pass any property, as against creditors or purchasers, for a valuable consideration from the donor, bargainor, or lessor, but from the registration thereof within the county where the land lieth: *Provided, however,* That the provisions of this act shall not apply to contracts, leases, or deeds already executed, until the first day of January, one thousand eight hundred and eighty-six: *Provided further,* That no purchase from any such donor, bargainor, or lessor shall avail or

> pass title as against any unregistered deed executed prior to the first day of December, one thousand eight hundred and eighty-five, when the person or persons holding or claiming under such unregistered deed shall be in the actual possession and enjoyment of such land, either in person or by his, her, or their tenants, at the time of the execution of such second deed, or when the person or persons claiming under or taking such second deed, had at the time of taking or purchasing under such deed actual or constructive notice of such unregistered deed, or the claim of the person or persons holding or claiming thereunder.

Leaving the *provisos* for consideration later, we invite attention to the declaration that a conveyance until registered shall not avail to "*pass title,*" as against the class of purchasers defined. A similar drastic provision had existed since 1829 in respect of mortgages and deeds of trust (*Leggett* v. *Bullock,* 44 N. C., 283; Rev. Code 1855, ch. 37, § 22; Pell's Revisal, 982); but the law concerning deeds of conveyance (until superseded by the Connor Act) was very different in language and effect. It provided—

> No conveyance of land nor contract to convey, nor lease of land for more than three years, shall be good and available in law unless the same shall be acknowledged by the grantor or proved on oath by one or more witnesses in the manner hereinafter directed, and registered in the county where the land shall lie within two years

> after the date of the said deed; and all deeds so executed and registered shall be valid, and pass estates in land without livery of seizin, attornment, or other ceremony whatever. Code of 1883, § 1245; Rev. Code, 1855, c. 37, § 1.

The period allowed for registration under this provision was extended from time to time until the Connor Act went into effect (*Laton* v. *Crowell,* 136 N. C., 377, 379), and while that situation existed it was repeatedly and uniformly held that a deed, duly executed, was valid without registration, not only between the parties to it but also against a subsequent registered deed to a purchaser without notice from the same grantor. The most that the first grantee was required to do in order to assert his paramount title was to register his deed before tendering it in evidence. The registration was regarded as a means of enabling him to prove an estate existing, or as that and as adding a touch of technical completion to a title which for most purposes was virtually complete already. Consequently the effect of the registration related back to the beginning, and all conveyances subsequent to the execution and delivery of the deed were cut out completely, whether taken with or without notice, and independently of the time of their registration.

Johnson v. *Lee,* 45 N. C., 43, 45.
King v. *Portis,* 81 N. C., 382.
Phifer v. *Barnhart,* 88 N. C., 333.
Austin v. *King,* 91 N. C., 286, 289.
Laton v. *Crowell,* 136 N. C., 377.

In *Johnson* v. *Lee, supra,* it was said (p. 45):

> A deed of bargain and sale operates to raise the use, and the legal title is passed by the statute of uses the instant the deed is delivered; so that registration is not necessary in order to pass the title, but is only required to make the deed competent as evidence.

King v. *Portis, supra,* involved a judicial sale made under foreclosure proceedings of a tract of land located in two counties, Nash and Franklin, but which was supposed to be wholly in the latter and was so described in the deed made by the sheriff, which, so far as shown, was not recorded in either county. At the same term of court in which the foreclosure proceeding was had, the plaintiff obtained a money judgment against the mortgagor, and learning that the lands sold to satisfy the mortgage were situated partly in Nash County, and that the sheriff's deed had not been recorded in that county, procured a transcript of his judgment to be docketed there, hoping thereby to acquire a lien on that part of the land. When the case was first before the court (77 N. C., 25), it was decided that the sheriff's deed made under the foreclosure proceedings did not convey any title to that part of the land which lay in Nash County and that such land was therefore subject to sale under the judgment which the plaintiff had procured to be docketed in that county.

Upon a rehearing, however, that decision was reversed, the court holding that the sheriff's deed under the foreclosure proceedings operated to divest both the mortgagor and mortgagee of title to all the land in both counties and that there was nothing left to which the judgment lien could attach; and, consequently, it was held that the purchaser under the sale made to enforce the judgment lien took nothing—notwithstanding the sheriff's deed, given under the foreclosure proceedings, had not been registered. The court said (p. 384):

> The defendants' title is derived under the judicial sale of the entire tract of specific and well-defined boundary lines, and the conveyance made under the order of the court. The estate in all the land was in the mortgagee, or, for want of registration as against creditors and purchasers, remained in the mortgagor. In one or both the entire title was vested, and both were parties to the action for foreclosure and sale. At the sale and by the deed the whole tract was conveyed to the defendant, who purchased, with all the interest and estate of each of the parties therein, if the court had jurisdiction to decree a sale of the part outside the county lines of Franklin. That such authority is possessed is manifest from the provisions of C. C. P., sec. 66, which declares that actions "for the foreclosure of a mortgage of real property" must be brought and "tried in the county in which

the subject of the action, or *some part thereof,* is situated."

The deed executed by direction of the court is not a "deed of trust or mortgage," effective only against creditors and purchasers from its registration "in the county where the land lieth," but in form and in substance is absolute and unconditional, and when registered passes the estate from the time of delivery, and by relation, from the day of sale.

The defendant thus obtains title to all the land, as well the portion in Nash as that in Franklin, and no estate or interest is left in the debtor to which the lien of the judgment subsequently docketed in the former county could attach; and hence nothing passes under the sheriff's deed to the plaintiff. If the mortgagor and mortgagee had united in executing a deed to a stranger, his title would be good against the creditors of the mortgagor. And is the conveyance of the interests of both, under the judicial decree, less comprehensive and operative in its results?

The delayed registration of a deed of trust or mortgage exposes the property meanwhile to the claims of creditors, who may prosecute the same to judgment and execution; *but it does not disable the debtor from disposing of the property by a valid conveyance before any lien attaches,* nor the court, in a proceeding to which he is a party, from transferring it by a judicial sale. The commissioner's deed having thus

divested the mortgagor's estate in the land in Nash, before the docketing of the judgment therein, and transferred it to the defendant, the plaintiff could take nothing by his purchase at the execution sale.

In *Phifer* v. *Barnhart, supra,* the subject was fully considered and the views of the court expressed as follows (p. 338 *et seq.*):

> While many of the judges have spoken of the estate which the bargainee in an unregistered deed takes in lands as an equity and of the instrument itself as an executory contract, we are aware of no authority for the position that the estate thus created can be displaced or defeated by the mere act of the bargainor in making another conveyance to a third party without notice and whose deed may be registered. On the contrary, whenever the question has been the subject of consideration by the court, as it has been more than once, its decisions have been uniformly inconsistent with any such idea.
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> In *Morris* v. *Ford*, 2 Dev. Eq., 412, it is said that such a bargainee, after the execution of his deed and before its registration, has not a mere equity in the land; he has an equity and an incomplete legal title, which will become *a perfect legal title from the time of the execution of the deed* whenever the registration shall take effect; and it was added that even before the enrollment of the deed he was tenant of the freehold

and therefore a recovery under a *praecipe* against him would be good.

Again, in *Walker* v. *Coltraine*, 6 Ired. Eq., 79, it was declared to be an error to say that an unregistered deed confers only an equity; that it is a legal conveyance, which, although it can not be given in evidence until registered and therefore is not a perfect legal title, yet has an operation as a deed from its delivery; and it was emphatically said that the *ignorance of such a title in one who might afterwards buy the land could not impair it.*

In *Wilcox* [Wilson] v. *Sparks*, 72 N. C., 208, Mr. Justice Reade, speaking for the court, says that although a deed can not be used to support a title until it is registered, still when registered it relates, and passes the title, as of the time of its execution, just as letters of administration relate to the death of the intestate.

In *Smith* v. *Turner*, 4 Ired. Eq., 433, the facts were that the father of the plaintiff conveyed certain land to one Jones, who devised it to the plaintiff. The conveyance being lost and unregistered, a judgment creditor of the father had the land sold, and it was purchased by the defendant: *Held*, that the plaintiff had a clear right to call for a conveyance from her father or from the defendant as having succeeded to the legal title; nor was the decision put upon the ground that the defendant, being a purchaser at an execution sale, was affected with the plaintiff's equity.

> Equally plain are the rights of these plaintiffs. A court of equity will compel Meares, or whosoever else may withhold their deed from registration, to produce it for that purpose, or, if it has been destroyed, will require the heirs of the grantor to make another in its place, which, when registered, will relate to the execution and delivery of the first deed, and so clothe them with a title dating from that time, perfect in itself, and *overlapping all intermediate conveyances. Hodges* v. *Spicer,* 79 N. C., 223.

From the above decisions it is apparent that, irrespective of the technical validity of the registration of 1869, the deed upon which the defendant bases its defense passed no estate or interest whatsoever in 1882, when it was executed by the attorney and Commisioner Elias. The entire equitable estate, supplemented by an imperfect legal title, was then outstanding in the United States, which was in no sense affected by the Swepson suit. Olmsted had nothing to convey, and the power of the court and its commissioner in that regard was certainly no greater than his. As the law then stood the deed to Rosenthal, though he were a *bona fide* purchaser for value (which we flatly deny), was for all practical purposes worthless; it conveyed no estate, and, even if registered, would have amounted to nothing in the face of the Government's deeds, which could be registered at any time.

So the situation remained until the Connor Act went into effect. The court below has assumed that that act was intended to make registration by January 1, 1886, necessary for the protection of ancient titles as against junior deeds made before as well as those that might be made after the time fixed in the act. The correctness of this assumption is not clear. There is nothing in the language or manifest purpose of the act to demonstrate an intention to disturb the relations already existing between claimants under conflicting grants. The purpose was rather to enable buyers to obtain good titles notwithstanding the confusion that had grown up under the prior law. Any buyer could do this by registering his deeds before the opposing deeds were registered provided he bought in good faith and for value, without actual or constructive notice of the outstanding claim of title, and provided the claimant under that superior title was not in possession of the land. The two provisos in the Connor Act remove any doubt of its purpose to disturb existing rights as little as might be consistent with the general policy of providing a method whereby sound titles might be readily acquired. For future cases the controlling fact was to be the fact of registration. Without it no title was to pass so far as subsequent grantees and purchasers for value were concerned. But, in cases past, the act distinctly recognized the influence of the old law under which they had arisen. The opinion of the learned court below

overlooks this very evident distinction. It is there said, as applicable to the facts of this case, that the purpose of the act was "to place deeds in respect to their registration and its effect upon creditors and purchasers for value upon the same footing as mortgages" (R., 63) and "to make the registration the single essential act on the part of the grantee, without which his deed was ineffectual to convey any title as against creditors and purchasers for value" (R., 64), and thereupon the court quotes from numerous decisions expounding the statute in its applications to deeds made after it went into effect, or the similar and much older provision concerning mortgages, as to which it was repeatedly held that "no notice to purchasers, however full and formal, will supply the want of registration" (R., 65).

It is our contention that the court below not only misconceived the general purpose of the Connor Act respecting past transactions, but that it ignored also the plain meaning of the proviso binding purchasers with constructive as well as actual notice. Only upon this assumption can we explain the refusal (R., 66) to follow the rule laid down by this court in *Simmons Creek Coal Co.* v. *Doran*, 142 U. S., 417. The object and limitations of the act were clearly described by its author in the opinion which he delivered in *Laton* v. *Crowell*, 136 N. C., 377, viz:

> * * * The history of the registration laws of the State shows that frequent ef-

forts were made to place deeds in respect to registration as affecting purchasers and creditors on the same footing with mortgages and deeds in trust. As the State became an inviting field for the investment of capital in the development of its resources in mines, lumber, water power, and agriculture, the laxity of our registration laws were found to be an obstacle to progress. The general assembly at each session having passed acts extending the time for the registration of deeds, section 1245 of the code requiring registration within two years after the date of deeds was not only abrogated but was misleading. This court uniformly held that the grantee holding an unregistered deed had either an incomplete or, as was sometimes said, an equitable title, which became perfect when the deed was registered and related back to its delivery; that the title when perfected by registration was paramount to title acquired by a purchaser for value without notice from the grantor although registered before the deed of prior date. The question is discussed with his usual ability, and the authorities reviewed by *Ruffin, J.*, in *Phifer* v. *Barnhart,* 88 N. C., 333. In this condition of the law it was impossible to make a perfect abstract of title to land or buy with safety. When the general assembly of 1885 undertook to legislate on the subject, it was objected that so radical a change and departure from the law and policy which had prevailed for more than a century would

endanger many titles and encourage frauds. To meet this well-founded apprehension the safeguards expressed in the several provisos found in the statute were incorporated. The effect of the first was to extend the time of the operation of the act to January 1, 1886. The second proviso protected titles acquired and held under unregistered deeds prior to December 1, 1885, if the holders of such titles were in the actual possession of the lands, or persons purchasing from the grantor had actual or contructive notice of such unregistered deed. The deed to Jane Simpson is within the second proviso. It is true the case comes within the evil intended to be remedied by the statute. It was impossible, in putting into operation a change so radical, in respect to a subject so important, to prevent some hard cases. If the defendant and those under whom he claims knew that Jane Simpson and those claiming under her were in the actual possession of the land at the time the mortgage was executed, prudence would have suggested that they make inquiry in regard to her claim. It is held by this court in *Cowen* v. *Withrow,* 116 N. C., 771, that the deed could be registered after January 1, 1886, and that when so registered it came within the principle announced in *Phifer* v. *Barnhart, supra,* and conferred a good title as against the mortgage deed under which defendant derives his title. Of course, what is here said

applies only to deeds coming within the proviso.

II.

The deed from Olmsted to Stevens, executed and delivered February 7, 1868, under which the United States deraigns title, was duly registered in accordance with the laws of North Carolina long before the execution of any of the instruments under which the defendant claims. It was therefore admissible in evidence as a deed so registered and its exclusion as such by the trial court was a vital error.

Olmsted was the common source. He had obtained the lands under the various State grants, which vested in him the complete legal title. On February 7, 1868, he deeded the land in controversy to Stevens who in turn conveyed it to the Government on March 15, 1869. The deed from Olmsted to Stevens was acknowledged (February 7, 1868) in the District of Columbia before a com-

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*"The governor is hereby authorized to appoint and commission one or more commissioners in such of the States of the United States or in the District of Columbia or any of the Territories as he may deem expedient. who shall continue in office during the pleasure of the governor and shall have authority to take the acknowledgment or proof of any deed, mortgage, or other conveyance of lands, tenements, or hereditaments lying in this State, and to take the private examination of married women, parties thereto, or any other writings to be used in this State. Any such acknowledgment or proof taken or made in the manner directed by the laws of this State and certified by the commissioner shall have the same force and effect, *for all purposes*, as if the same had been made or taken before *any competent authority in this State*." Rev. Code, 1855, ch. 21, § 2.

missioner for the State who was authorized by a law of the State* "to take the acknowledgment or proof of any deed * * * of lands * * * lying in this State"—a law which further provided that such an acknowledgment when certified by the commissioner should "have the same force and effect, *for all purposes,* as if the same had been made or taken before *any competent authority* in this State." No question is made of the juridsiction of the commissioner or of the form or sufficiency of his certificate. No denial is made of the fact that the deed with the certificate of the commissioner, bearing his official signature and seal (R., 9), was correctly transcribed upon the records of the proper county soon after execution. The register's certificate (R., 10) shows that this was done on February 23, 1869. The validity of that registration is assailed solely upon the ground that there was no *fiat* or order of the proper authority of the State to supplement the certified probate before the commissioner in the District of Columbia. That such a *fiat* or order would have been given if applied for is not denied, and could not be, since the sufficiency of the certificate was regularly approved by the clerk of the superior court in 1896, when the second registration occurred (R., 10), and is not challenged now. We now inquire into the nature and existence of this technical omission which is said to overthrow a title to valuable property claimed by the Government for nearly half a century.

1. *The order for registration, the supposed omission of which led both courts below to reject the registration entirely, was a mere precautionary formality, designed to supplement the real probate of the instrument which occurred before the commissioner when the execution took place.*

The law governing the registration of deeds at the time when the deed from Olmsted to Stevens was executed, February 7, 1868, will be found in sections 1, 2, and 5 of chapter 37 of the Revised Code of 1855, viz:

> 1. No conveyance for land shall be good and available in law, unless the same shall be acknowledged by the grantor, or proved on oath by one or more witnesses in the manner hereinafter directed, and registered in the county where the land shall lie, within two years after the date of the said deed; and all deeds so executed and registered shall be valid, and pass estates in land, without livery of seizin, attornment, or other ceremony whatever.
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> 2. All deeds, bills of sale, powers of attorney, and other instruments of writing required or allowed to be registered, may be admitted to registration in the proper county, upon being acknowledged by the grantor, or proved on oath before one of the judges of the supreme or superior court, or in the county court of the county where the land or estate is situate, unless otherwise directed, or before the clerk of such court, or his deputy. Provided, that nothing herein contained shall be construed to

allow the privy examination of *femes covert* to be taken otherwise than by law is specially directed.

5. * * * Or when such deed, power of attorney, bill of sale of slaves, or other instrument as aforesaid shall be so acknowledged or proved, and the privy examination taken as aforesaid, before any commissioners appointed by the governor of this State, according to law, and duly certified by him, such deed, power of attorney, bill of sale, or other instrument, being exhibited in the court of pleas and quarter sessions of the county where the property is situate, or to one of the judges of the supreme court or of the superior courts of this State, *shall be ordered* to be registered with the certificates thereto annexed; and the same being registered in the county wherein the property may be situate, pursuant to such order; or, in the case of slaves, in the county as by this chapter is directed, shall be valid in law for the purpose intended thereby, and shall be received in evidence in any court without further proof.

Before the deed was actually registered (February 23, 1869), changes were wrought by the following provisions contained in the Code of Civil Procedure of 1868, which was ratified August 19 of that year.

All deeds conveying lands in this State, or letters of attorney, or other instruments concerning the same, except leases not hav-

ing more than three years to run, *must be offered for probate*, or a certified probate thereof *must be exhibited before the judge of probate** [*of the county in which the real estate is situated*], in the manner following:

* * * * *

* By the act of March 8, 1869 (Laws 1868–9, ch. 277), the words in the first of these paragraphs which we have placed in brackets were amended to read "of any county of this State." Battle's Revisal, ch. 35, § 2.

By another act of the same date (March 8, 1869) it was provided:

SECTION 1. That so much of chapter two, title nineteen, of the Code of Civil Procedure as requires that deeds conveying land and powers of attorney, and other instruments concerning the same, shall be offered for probate and proved before the clerk of the superior court of the county in which the land, or some part of it, is situated, be altered and amended so that it shall be lawful to offer any such deeds, power of attorney, or instrument for probate, and acknowledge or prove the same before the clerk of the superior court of any county in the State, who shall have full power to take the private examination of married women as provided by law.

SEC. 2. That any clerk before whom such deed, power, or instrument is acknowledged or proved, or the private examination of married women taken in relation thereto, shall certify the fact upon said deed, power of attorney, or instrument; and the clerk of the superior court of the county wherein the land lies, upon the exhibition of such certificate to him, shall adjudge the said deed or other instrument to be duly acknowledged and proved in the same manner as if made or taken before him.

Laws of 1868–9, ch. 64; Battle, ch. 35, § 5.

These acts went into effect after the registration of the deed from Olmsted to Stevens, and in view of what we shall say of the act of January 27, 1870, they are not material to that registration. They are, however, involved in some of the authorities from which we shall take occasion to quote below.

> 4. Where the acknowledgment or proof of any deed or other instrument is taken or made, in the manner directed by the laws of this State, before any *commissioner* of affidavits for the State of North Carolina, appointed by the governor thereof, in any of the States or Territories of the United States or in the District of Columbia; and where such acknowledgment or proof is certified by such commissioner, *the judge of probate* having jurisdiction, upon the same being exhibited to him, shall *adjudge such deed* or other instrument *to be duly acknowledged or proved* in the same manner as if made or taken before him.
>
> Code of Civil Procedure, 1868, Title XIX, ch. 2, § 429.

It will be noted that whereas the Revised Code of 1855 provides that deeds certified by commissioners out of the State shall have the same force and effect "for all purposes as if made before *any competent authority* in the State," and upon being "exhibited," either in a court of pleas and quarter sessions, or to any of the judges of the supreme or superior courts, "shall be *ordered* to be registered with the certificates thereto annexed," and shall thereupon be valid in law for all purposes and receivable in evidence in any court without further proof, this later law directs in peremptory terms that they be exhibited before the judge of probate* (clerk of the Superior Court)

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*The clerks of the Superior Courts were *ex officio* judges of probate. Code Civ. Proc., Title XIX, ch. 1.

of the county where the land lies and declares that that official shall thereupon *adjudge them to be duly acknowledged,* etc. But this later law, with its added formalities, is quite immaterial in so far as the deed to Stevens is concerned, in view of a remedial act of the legislature of January 27, 1870, which declares:

> That the probate of all deeds and other instruments required to be registered, *heretofore taken* under laws existing prior to the adoption of the Code of Civil Procedure, is hereby declared valid to all intents and purposes and shall be admitted to registration as if the probate had been taken under existing laws. Laws of 1869–1870, ch. 32.

That deed had been executed, acknowledged, certified, and registered before the date of this remedial statute, and therefore the validity of its probate and registration is to be tested, not by the law of 1868, but by the law which previously existed. All that was needed under the act of 1855 to render the registration perfect in every particular was merely the informal order of one of the courts or judges specified in section 5 of the Code of 1855, *supra.* This was not a solemn adjudication nor a part of the "probate." Any one of the judges, upon examining the deed, could, at any place in the State, give directions for its registration; could do this without reference to the terms of his court, and could do it without any particular

manner or form of writing, and even, it would seem, without any writing at all. The probate before the commissioner and his certificate were the vital things; the provision for the supplemental order was merely precautionary.

In *Holmes* v. *Marshall*, 72 N. C., 37, the question arose whether the direction in the Code of 1868, as amended by the acts of 1869, *supra*, that the probate judge of the county embracing the land should pass upon all probates certified by other officials, was mandatory or directory, as applied to a probate taken and certified by a probate judge of another county. Concerning this the court said (p. 40):

> The object of the registration of deeds, etc., is evidently to notify the public of their existence. (See *Latham* v. *Bowen*, 7 Jones, 341.) If that be the sole object, why may they not be registered upon presentation to the register by any party, without any probate at all? We conceive the reason to be this: If no probate by oath were required, it would probably happen that many false and unreal deeds, etc., would be registered, and the public would have no probable ground to believe in the genuineness of any of them. The probate of a deed is always *ex parte;* it is not conclusive; it need not be registered with the deed. *Starke* v. *Etheridge*, 71 N. C., 240. It may be made by an incompetent witness, and yet the registration will be valid. *Jones* v. *Ruffin*, 3 Dev., 404; *McKinnon* v.

McLean, 2 D. & B., 79; *Starke* v. *Etheridge, ubi supra.* The registration of a deed has no conclusive force except as a notice.

Every apparent object of the laws requiring registration can be accomplished by a registration upon a probate before any officer competent to take probate.

The law authorizes every probate judge in the State to take probate of any deed. It says that his certificate of probate shall be passed on by the probate judge of the county in which the deed is required to be registered before its registration. But it does not say that the registration shall be void unless it is so passed on. It seems to be established that in general an affirmative statute is merely directory. *Rex* v. *Inhabitants of Birmingham,* 8 B. & C., 29–35 (E. C. L. R.); *Cole* v. *Green,* 6 Man. & Granger, 872 (46 E. C. L. R.), Sedgwick, 370.

No reason occurs to us why the probate judge of Rowan, being by statute competent to pass on the sufficiency of the probate of all deeds required to be registered in his own county, should not be equally competent to pass on the sufficiency of the probate of those to be registered in other counties.

It would seem that a power to take probate naturally carries with it, as an incident, a power to order registration. By an act of assembly before the Revised Statutes, and which may be found in the Revised Code, chap. 37, sec. 2, judges of

the supreme and superior courts were authorized to take probate of deeds. It is well known that the invariable practice was to add to the certificate of probate a *fiat* for registration which was obeyed by the register of any county in which the deed was offered for registration without having been passed on by the clerk of the county court, who was the general probate officer of the county. Many estates rest on registrations of this sort, and they were never questioned. But they could only have been valid on the idea above stated, that the power to order registration was an incident to the power to take probate. We can not think that the legislature intended to change this settled practice by indirection—by a simple affirmative statute directing an additional ceremony. If it had intended to make every registration void, except on the *fiat* of the probate judge of the county of registration, it would have said so plainly.

There are other reasons against construing this provision of the registration acts rigidly according to their literal import. They seem to consider the probate of a deed as an adjudication of its due execution. It is almost certain that the legislature never intended this with its consequences. If an adjudication at all, it would be *in rem*, and conclusive on all the world, which could never have been intended.

We conclude that the provision requiring the certificate of probate by the probate judge of a county other than that of regis-

> tration, to be passed on by the probate judge of the county of registration, is *directory,* and that a registration upon a probate which has not been so passed on is not void.

It will be observed that here (and the same is true of other like opinions we shall quote) the supplementary order for registration was treated as a matter *distinct from the probate,* and that the latter alone was regarded as the substantial thing justifying registration. It will also be observed that, while the court drew an argument from that fact that each probate judge was authorized both to probate and to pass upon the sufficiency of probates for deeds conveying lands in his own county, it recognized that to comply with the directory intention of the statutes construed *all* probates, whether certified by officials possessing this dual power or not, should be examined by the probate judges of the counties where the lands were situate. In other words, the latter function was independent of the probating function, but, because it was a precautionary formality, its performance was not deemed essential.

By parity of reasoning, a deed like the Olmsted deed, probated before a commissioner and duly certified, could obtain a valid registration without being supplemented by the very informal order contemplated by the Code of 1855. The statute under which the commissioner acted placed

his probates " for all purposes " upon a par with those of any authority in the State.

In *Young* v. *Jackson,* 92 N. C., 144, a similar case, *Holmes* v. *Marshall,* was approved and followed. The court said:

> Regularly the provision of this statute requiring deeds and other instruments proven before judges of probate in counties other than the county where the land lies, and the other kind of property is situated, and the certificate of probate attached thereto, to be exhibited to the judge of probate of the latter county, and that he shall adjudge the same to be duly proven and order its registration, ought to be observed, but this requirement is directory only and not of the essential requisites to registration; its purpose seems to be to secure greater, not essential, certainty as to the probate, and an orderly memorial of it in the county where the property conveyed is situated. *The important thing required, with a view to registration, is, that the deed or other instrument requiring registration shall be proven before a tribunal or officer authorized by law to take and certify the probate.*
>
> The purpose of registration is to give authoritative public notice of deeds and other writings required by law to be registered, and their purpose, as expressed in them, to perpetuate them as evidence, and to make them *prima facie* evidence in all actions, proceedings, and matters wherein they may be pertinent. The probate is not conclusive

except as to notice of the instrument, and its purpose as expressed in it, when duly registered; it is an *ex parte* ascertainment, by authority by law, that the instrument registered is authentic, and to be so treated by all persons affected by it, until in some proper way the contrary is made to appear. *Now, when the instrument is proven, and the probate is certified as prescribed by law, and it is registered in the proper county, the essential purpose of registration and the law is served, and this is sufficient notwithstanding some of the nonessential, yet helpful forms to be observed between the probate and registration of the instrument, have been omitted.* The legislature certainly has power to make forms essential, but unless it shall do so in plain terms the failure to observe them, especially where they appear from their nature or terms to be directory, will not be allowed to defeat the chief purpose of a salutary statute.

After further reference to *Holmes* v. *Marshall*, the opinion proceeds:

The case cited was decided in 1875. It has been treated as a proper construction of the statute in question, and, as thus construed, it has been acted upon, no doubt, in many cases. To disturb it would unsettle titles and give rise to much confusion and injustice. We can not think of doing so.

In *Darden* v. *Steamboat Co.*, 107 N. C., 437, the question again arose upon the construction of

subsection 2 of section 1246 of the Code of 1883. That subsection provides that when a grantor or subscribing witnesses reside in the State but not in the county embracing the land the instrument requiring registration must be acknowledged or proved before a judge of the supreme or superior court, the clerk of the superior or inferior court, a notary public or justice of the peace, etc., and concludes with a provision that the clerk of the superior court of the county where the land is, upon the exhibition to him of the instrument, together with the certificates, shall adjudge the instrument to be duly acknowledged or proved in the same manner as if taken before himself, and order the same, with his certificate and the other certificates attached, to be registered. In spite of these provisions it was held, following *Holmes* v. *Marshall* and *Young* v. *Jackson, supra,* that the supplementary action of the clerk was not to be deemed essential to the validity of a registration made upon the faith of a probate certified from another county. The court says (p. 446):

> The provision contained in the last sentence of the subsection (§ 1246) (2), that the clerk of the superior court of the county where the land lies shall pass upon the acknowledgments taken before other clerks, judges, or justices of the supreme court, and determine whether they have been taken in due form or in the same manner as if he had taken them himself was not intended to be mandatory, but directory merely.

The attempt to distinguish the present case upon the ground that the *fiat*-making power was not lodged in the commissioner along with the power to take and certify probate is without substantial justification. The officers whose "probates" were involved in the cases cited were authorized to make *fiats* for registration *for their own counties,* to be sure; but they had no more authority to make such *fiats* for other counties than the commissioner had. They were authorized, in such case, to take and certify the proof of execution—the "probate"—and that alone; and in this their authority was no greater and no less than was the authority of the commissioner in respect of the conveyances of non-residents appearing before him in the State for which he was appointed.

Of the cases cited in opposition to our position on this point, *Evans* v. *Etheridge,* 99 N. C., 43, is the only one which appears to require very close analysis. The instrument there in question was a deed of trust to secure a debt, which had been executed and acknowledged before a commissioner of affidavits for the State in the District of Columbia, and by him certified in May, 1886 (not *1866* as stated by the court below in its opinion R., 61). It was registered without an order of "due execution" by the clerk of the superior court, as the certificate of the register of deeds *affirmatively* showed. The registration was held

insufficient for lack of the order, the court being of opinion that the statutory requirement in that regard was not directory merely, but mandatory. *Young* v. *Jackson* and *Holmes* v. *Marshall, supra,* were distinguished upon the ground that "the functions of the clerk are broader than those of the commissioner. He not only takes the proof or acknowledgment, but adjudges the fact 'of due execution,' whereas the commissioner of affidavits, and perhaps others, only take and certify the acknowledgment or proof." * * *

> In cases of probate before clerks who can both take the evidence and adjudicate the fact, it has been held that, though it ought not to be omitted, the *fiat* of the clerk of the county of registration is not an absolute prerequisite to a valid registration, *but the validity of the registration in such cases rests upon the fact that there has been an adjudication of "due execution" by an officer competent to both hear evidence and adjudicate* (p. 48).

This quotation at once distinguishes *Evans* v. *Etheridge* from the case at bar. The court was construing a statute providing that the clerk, in acting upon a probate taken by a commissioner, "shall adjudge such deed or other instrument to be duly acknowledged or proven in the same manner as if taken before him." The distinction between this and the language of the Revised Code, *supra,* upon which the first registration of the

deed to Stevens depends, was recognized by the court below in the concession (R., 61):

> While it is true that *prior to 1868* the statute *did not* require that a probate taken by a commissioner of deeds out of the State should be adjudged to be correct, yet there can be no question that by the act of 1868 an adjudication was required and is essential.

So in the case of *Cozad* v. *McAden,* 150 N. C., 206, quoted by the court below (R., 61), it was said:

> It has been uniformly held since the enactment of the statute controlling this matter *in 1868,* that when the acknowledgment of a deed or other instrument requiring registration has been taken before some official outside of the State that, in order to a valid probate, the deed with a proper certificate should be presented to the resident clerk for approval, and there should be an *express adjudication* to that effect by the local officer.

The court below relied strongly upon *Evans* v. *Etheridge,* apparently accepting it as indistinguishable from this case. This error is attributable to the assumption that the registration of our deed was to be tested by the law as changed, in 1868, after it was probated before the commissioner. The court's attention was called (R., 68) to the curative act of January 27, 1870, above mentioned, which declared that the probate of all

deeds theretofore taken under laws in force *before* the Code of 1868, *supra*, should be valid for all intents and purposes, and that such deeds should be admitted to registration as if the probate had been taken under existing laws; but it either failed to consider that statute entirely, or put it aside, as it did another curative act of 1876, upon the ground that "there was no probate at all!" The opinion is somewhat obscure on this subject. See R., 69. We have already pointed out that, when our deed was executed, the proceedings before the commissioner and his certification constituted the *only* probate contemplated by the law, and that the effect of his action in that regard was declared to be the same for all purposes as the effect of similar action by any of the probating authorities in the State. The informal order for registration, directed by the Code of 1855, was no part of the probate, any more than the similar order, express or implied, from the local probate judge, which is held by all the authorities to be a formal matter wholly distinct from the probate.

The formal adjudication of "due execution," first required by the act of 1868, is treated in *Evans* v. *Etheridge* and similar cases, and, indeed, by the court below, as an added element in the probate itself. Hence, when the probate was taken and certified by an official who had power to make that adjudication in respect of deeds conveying lands in his own county, his probate was

deemed a substantial, though not a perfect, compliance with the law. *Holmes* v. *Marshall, supra.* But when a deed, governed by the law of 1868, came from a commissioner who had no power to introduce the new element into his probate an adjudication by the clerk, who had the power, was deemed necessary. *Evans* v. *Etheridge.*

In the case of *Johnson* v. *Lumber Co.,* 147 N. C., 250 (also relied on by defendant), the court said:

> The order of the Court of Pleas and Quarter Sessions merely directed that said deed and certificate of the commissioner "be recorded and registered in Jackson County," without any adjudication that the certificate was "in due form and according to law." Such adjudication is required by the statute of 1868, and ever since, to be made by the probating officer in this State as an essential part of the order of registration (Revisal, secs. 999, 1001), and the omission of such adjudication has always been held under such statute to make the registration without authority of law and without effect. *Starke* v. *Etheridge,* 71 N. C., 243; *Todd* v. *Outlaw,* 79 N. C., 237; *Evans* v. *Etheridge,* 99 N. C., 46, and numerous cases since. But these all rest upon the wording of the statute in force in 1868 and since. Those cases cite, it is true, cases prior to 1868, but such cited cases are only to the well-settled rule that when the probate, acknowledgment, or order of registration does not conform to the statute the registration is void.

> The statute in force when this foreign acknowledgment, privy examination, and order of registration took place in 1859 was Revised Code, ch. 37, sec. 5, which did not contain any requirement, as now, that the probate court here should after due examination *adjudge* that the acknowledgment and privy examination were duly proven and that the certificate was in due form before ordering registration, but said section 5, chapter 37, Revised Code, only required that the instrument, "being exhibited in the court of pleas and quarter sessions of the county where the property is situate, or to one of the judges of the supreme court or of the superior courts of this State, shall be ordered to be registered with the certificates thereto annexed." Presumably these officers would not have ordered any such conveyance to registration unless it had appeared to be duly proven and certified in due form. But as the statute did not at that time require the probating officers, as now, to so adjudge as a preliminary condition to making the order of registration, a failure to enter such adjudication as a part of the order does not invalidate the registration, and it was error to exclude the deed as evidence.

This quotation serves to bring out the distinction between the direction of the Code of 1855 and the requirement of the later law. The opinion assumes (the question was not involved) that prior to 1868 the order for registration was es-

sential, but the statement that there was a well-settled rule to that effect was evidently due to an inadvertence. We believe a careful examination of the authorities on the subject will bear us out in the assertion that, prior to the recent case of *Cozad* v. *McAden,* 148 N. C., 10, which was reversed upon rehearing and decided on another point (s. c., 150 N. C., 206), there was no decision that such an order was a vital necessity, though we concede that there are *dicta* to that effect in some of the opinions which did not involve the question. Of these *Johnson* v. *Lumber Co., supra,* is a good illustration.

Todd v. *Outlaw,* 79 N. C., 235, relied on by the defendant and cited in the opinion below, is wholly out of point. The mortgage there involved was held not to have been lawfully registered, not because a *fiat* of the probate judge of the proper county was lacking, since such a *fiat* was actually made and spread upon the record; the defect was in the *probate* which had been taken before a justice of the peace and certified by a county clerk, both in the State of New York. Neither of those officials was authorized by the law of North Carolina, which the opinion cites (Battle's Revision, ch. 35, §§ 7 and 8) to act in such a manner, and for that reason and that alone the court was obliged to hold that the mortgage "has not been probated as the law directs."

While in *Simmons* v. *Gholson,* 5 Jones L., 401 (decided in 1858), there are expressions, *arguendo,* sup-

porting the idea that the function of the commissioner was merely to take and certify *evidence,* to be used as a basis for an adjudication by the *fiat*-making court or officer, the only question raised and decided was whether the clerks of the courts of pleas and quarter sessions, under a statute giving them authority " to take the probate, or acknowledgment of deeds of trust or mortgages, at any time, in as full a manner as their respective courts can or may do " possessed authority to issue *fiats* for the registration of deeds certified by commissioners. The question whether the *fiat* was essential was not discussed or even suggested. Apparently the court's attention was not called to the sweeping effect given at that time to the certificates of commissioners by Rev. Code 1855, ch. 21 § 2, *supra.*

In *Cozad* v. *McAden,* 148 N. C., 10, the court held that a registration on September 30, 1869, made upon a commissioner's certification was void for lack of an order, saying (p. 12):

> The plaintiff then offered a certified copy of the deed of 1 February, 1867 (Herbert to Hineman), from the register of deeds of Cherokee County (in which the land lay in 1869), showing that it had been registered in that county 30 September, 1869, but this was properly rejected, there being no order of registration from the clerk. The endorsement was simply, " The foregoing deed came to hand 30 September, 1869, and was then duly registered," etc., giving

> book and page, and signed by the register. The invalidity of such registration upon the certificate of the commissioner of deeds without an adjudication of the clerk is decided. *Evans* v. *Etheridge,* 99 N. C., 43. It is true that at that time the statute did not require the probate to be registered (*Perry* v. *Bragg,* 111 N. C., 163; *Cochrane* v. *Improvement Co.*, 137 N. C., 386), if there was in fact a proper probate that could be shown. But it was indispensable that there should at least be a *fiat* from the clerk ordering the deed to be registered. (Revised Code, ch. 37, sec. 5.)

The reference to *Evans* v. *Etheridge* was, of course, inaccurate. That case, as we have seen, turned upon the requirement of an *adjudication* as distinct from a mere order of registration—a distinction which is recognized in the very opinion and page from which we have just quoted where the court says: "Up to C. C. P., sec. 429 (24 August, 1868), the statute merely required 'an order for registration.' *Johnson* v. *Lumber Co.*, 147 N. C., 249. Section 429, C. C. P., required an adjudication, but a curative statute was enacted, making probates in the previous manner valid up to 27 January, 1870. Laws 1869–70, ch. 82." Furthermore, the decision, as we have said, was reversed upon rehearing (*Cozad* v. *McAden,* 150 N. C., 206), and the deeds in question were upheld upon registrations made in 1893, and while the court, unnecessarily, declared in the

later-opinion (p. 209 *et seq.*) that "since the enactment of the statute controlling this matter in 1868," deeds certified from out the State in order to be validly probated should be made the subject of an express adjudication by the local officer, it recognized clearly that under the law as it was before that date, such an adjudication was unnecessary.

Although it is not easy to make a clear analysis of this complex of statutes and decisions, we trust we have succeeded in bringing out the following propositions:

(*a*) The *probate,* or official proof of the due execution of the deed was the essential prerequisite to a valid registration.

(*b*) Under the law existing when the Olmsted-Stevens deed was executed and proved before the commissioner, and the probate duly certified by him, no additional formality was provided for except the supplementary order for registration by any judge, etc.

(*c*) This supplementary order constituted no part of the probate, and was therefore not essential.

(*d*) After the adoption of the Code of Procedure in August, 1868, it became necessary to obtain a supplementary adjudication that the deed was "duly acknowledged *or* proved," and this is to be regarded as constituting an element in the probate itself, lying outside of the function of the commissioners as defined in the earlier law but

within the functions of the clerks and other officers authorized to make orders for registration in their own counties.

(*e*) The authorities cited by the defendant and the court below (except possibly the overruled decision in *Cozad* v. *McAden,* 148 N. C., 10) relate mainly to this provision of 1868, and do not compel the conclusion that the informal order previously provided for would be deemed essential in any case.

(*f*) The principle applied in *Holmes* v. *Marshall,* and *Young* v. *Jackson, supra,* sustains the registration of the Olmsted-Stevens deed in 1869. Those cases were decided upon the fundamental ground that, as the taking and authentication of proof of due execution—that is, the " probate "—fulfill the substantial conditions entitling a deed to registration, the lack of a supplementary *fiat*—which, be it observed, the persons officiating in those cases *had no power to make* in respect of the transactions in question—may be properly overlooked.

That principle, we submit, applies here. It can only be differentiated upon the filmy distinction that, whereas the commissioner had no *fiat*-making power in any case, the officials whose probates were considered in the above authorities did have that power for *some* purposes, though they had it not in the very cases in which the *fiat* was held unnecessary.

So technical and insubstantial a distinction as this ought not to be allowed to overthrow the ancient title of the Government in favor of this defendant, which undoubtedly, when it acquired its claim, was charged with perfect notice through the later registrations. We concede the force of the decisions of State courts construing State laws, but when, as here, there is an effort to accomplish a manifest injustice through the medium of a barren technicality, we submit that the *dicta* and generalizations contained in recent opinions should not be permitted to destroy vested rights—particularly the vested rights of the United States—by retroacting through long periods of time.

2. In view of the conceded sufficiency of the commissioner's certification, the fact of registration by the proper State official and the long lapse of time, the existence of a proper order of registration, if necessary, should be presumed.

In *Knox County* v. *National Bank,* 147 U. S., 91, 97, the court said:

> It is a rule of very general application, that where an act is done which can be done legally only after the performance of some prior act, proof of the later carries with it a presumption of the due performance of the prior act.

Nofire v. *United States,* 164 U. S., 657, was a criminal case, in which the jurisdiction of the trial court depended upon whether the defendant had or had not become an adopted citizen of the Chero-

kee Nation. To prove that he had, a marriage license was produced issued by the proper official, but no evidence to show that when it was issued the applicant had exhibited a certificate of moral character signed by 10 citizens of the nation, and had taken an oath of allegiance, both of which preliminaries were essential to the validity of the license and the marriage, according to the Cherokee laws. This court held (p. 660):

> The fact that an official marriage license was issued carries with it a presumption that all statutory prerequisites thereto had been complied with. This is the general rule in respect to official action, and one who claims that any such prerequisite did not exist *must affirmatively show the fact.*

The opinion cites numerous other decisions of this court.

If an order from a judge or one of the other State officials specified in the Revised Code of 1855 was necessary, it must be presumed that the register had that authority in some form before he accepted the deed for registration.

This proposition is sustained by the decisions of the State court. See *Cochran* v. *Improvement Co.,* 127 N. C., 386, 398, and *Moore* v. *Quickle,* 159 N. C., 129, 130, and the other cases therein cited.

In *Cochran* v. *Improvement Co., supra,* respecting a deed dated March 12, 1796, proof of which was made, not by the original (which was lost), but by a certified copy made by the register in

1859, it was held that the existence of a probate in due form would be presumed *from the mere fact of registration.* In that case there was nothing whatever to show where the deed was acknowledged or proved, or indeed that it had ever been acknowledged or proved at all—other than the presumption arising from the fact that the register received and recorded it.

In the recent case of *Moore* v. *Quickle, supra,* the court said (p. 130):

> The question has arisen in several cases before this court, and it has been held, as we think, without exception, in the absence of evidence and when there is nothing in the form of the probate on the deed indicating that it was improperly taken, that a presumption arises from the act of the register of deeds in admitting the deed to registration that the probate was by the proper officer and regular, and that proof of that fact was before him.

Of course, if the law had required that the probate and certificates be themselves registered, the presumption might not arise, but it is well settled that the law did not require such matters to be spread upon the records. *Cochran* v. *Improvement Co.,* p. 399, and cases there cited.

In *Love's Executors* v. *Harbin,* 87 N. C., 249, 253, the court said:

> In considering the second objection, it must be observed that the statute nowhere makes it the duty of the officer, who ad-

> mits a deed for probate, whether he be a clerk or judge, to make and record a formal adjudication of its probate; and in the case of the judge it would be manifestly impossible for him to do so, except upon the instrument itself. Nor is there any provision which requires the register to spread upon his books the certificate of such adjudication, in case the same be made.

The cases in which registrations have been held void for want of regular probates or supplementary orders are cases in which the defect appeared affirmatively or was assumed in the opinion.

The defendant will argue that we robbed ourselves of the presumption by producing the original deed. This would doubtless be a sound objection if the statute had required the *fiat* to be written on the deed itself; but there was no such requirement. The order, even if it could not have been given verbally, could certainly have been inscribed on a separate paper identifying the deed, and this, when lodged with the register, would have been sufficient evidence to him of his authority to proceed with the registration. The opinion in *Love's Executors* v. *Harbin, supra,* informs us that there was a *habit* of inscribing such orders on the deeds, but it also says that there was a habit of recording them. When the habit was departed from in the latter particular, there were, as we have seen, no detrimental consequences, because as the statutes created no duty to record, the

departure from a mere practice of convenience in that regard could not do away with the presumption that the registration would not have been attempted without the existence of a proper probate and all necessary precedent formalities. And so the mere habit of writing the *fiat* for registration on the deed should not be allowed to overweigh the strong presumption that the register did his statutory duty when this particular deed was registered in 1869.

" If the rule is ever applicable," said the court in *Moore* v. *Quickle, supra,* page 130, " it should be in a case like this, where the deed has been registered more than forty years."

The deed from Olmsted to Stevens had been registered for more than 40 years when this action was begun and for nearly 40 years when the defendant took its deed. Moreover, it is a deed which, beyond controversy, was properly executed and certified and entitled in every respect to be placed upon the record.

3. Any defect in the registration of the Government's deeds was cured by the act of December 12, 1876 (ch. 23, Laws 1876–77).

This act is entitled "An act to provide for the registration of certain deeds and other instruments of writing, and to make valid the registration of others." The first section extends for the period of two years the time within which deeds and other instruments of writing required to be

registered might be proved and registered. The second section declares:

> That all deeds and other instruments of writing allowed of [or] required to be registered, which have been heretofore proved or acknowledged, and the private examination taken of *femes covert,* if any, executing the same, and certified according to the then existing law, but not registered, shall, with such certificate, be registered by the register of the proper county upon payment to the judge of probate of such county or other officer authorized by law to admit such deed to probate for such register, the registration fees as prescribed by law, and presentation of such deeds or other instruments of writing, with such certificate to such register for registration, at any time within two (2) years from and after the ratification of this act; and the registration of such deeds and other instruments of writing herein provided for, as well as the registration of all deeds and other instruments of writing allowed or required to be registered, which have been heretofore registered, but not by or within the time required by law, shall be as valid and effectual in law as if the same had been before duly registered in all respects according to law: *Provided,* That this act shall not apply to deeds of trust, mortgages, or marriage settlements.

It will be observed that this section refers to (*a*) unregistered deeds theretofore proved or acknowledged and (*b*) deeds previously registered.

Respecting the first class, it is provided that they may be registered upon payment to the judge of probate, or to the officer authorized by law to admit deeds to probate, of the registration fees prescribed by law, while as to the other class it is declared that deeds "which have been heretofore registered, but not by or within the time required by law, shall be as valid and effectual in law as if the same had been before duly registered in all respects according to law."

We do not find that this act has been construed by the supreme court of the State, but its purpose was, we think, to admit to registration merely upon the payment to the proper official of the fees required by law, without the formality of an adjudication of the probate court, all deeds which had been previously executed and acknowledged; and, second, to validate the registration previously made of all deeds, provided only that they had been executed and acknowledged. While the language of the act is not entirely clear in this respect, it is susceptible of the construction for which we contend, and, being a remedial statute, should be construed so as to effectuate the purpose of the legislature. *Logan* v. *Davis,* 233 U. S., 613; *Tatom* v. *White,* 95 N. C., 453, 459.

The statutes of North Carolina abound with curative acts of this sort, passed for the protection of titles against the dangers arising from the vagueness or general misunderstanding of the

laws concerning registration . (*Tatom* v. *White, supra.*) For instance, the law compiled as section 1022 of Pell's Revisal validated the registration of all deeds made before February 15, 1883, proven by a notary or clerk of court outside of the state, etc., and registered upon the certificates of those officials. There are so many like provisions in that compilation and elsewhere, of various dates, that they evince a general continuing purpose upon the part of the legislature to cure all such formal defects as the one here said to be involved. No reason can exist why the legislature should single out the deeds certified by the state's commissioners, officials specially appointed under her laws to authenticate the execution of such instruments, as not worthy of protection. In this situation we feel justified in urging that while the present case may not fall within the letter, it should be held to come within the spirit of the act above quoted.

Bearing in mind that the only possible defect in the registration was the absence of the formal order, and that the first part of the above section would have authorized a new registration within two years without any other formality than a tender of the fees, it seems not unreasonable to construe the authority to record as amounting to a ratification of the pre-existing registrations of the instruments thus authorized to be recorded.

The answer of the court below to the citation of this statute (R., 69) was that in this case there

was "no probate at all," and that therefore an act undertaking to cure defective probate could not apply.

III.

The evidence affirmatively showed that the Government's title was fully protected by the registration of its deeds in 1896, and therefore the verdict was erroneously directed, without regard to the error committed in excluding the earlier registration.

The deed taken by the defendant was executed in May, 1906, and registered in July, 1909 (R., 38).

The deed to S. E. Cover and others, defendant's immediate predecessors, was executed in February, 1905, and registered in November, 1906 (*Id.*).

Cover's grantors, the children and devisees of R. Y. McAden, derived their claim through his will and through the deed to him from Swepson's widow and the deed to J. H. McAden from A. Rosenthal, respectively.

The deed from Swepson's widow was dated in May, 1888, and registered in June, 1888 (R., 38).

The quitclaim from A. Rosenthal to J. H. McAden was dated in May, 1889, but was not registered until May, 1906 (R., 28).

Rosenthal's title was based on the deed from Elias, the commissioner, in the suit of *Swepson* v. *Olmsted,* which was dated October 28, 1882, and registered in October, 1890, and upon the quitclaim to him from Olmsted, which bore date October 31, 1882, but was not registered until November, 1906 (R., 27).

From this résumé it will be seen not only that the deed to the defendant and the deed to its grantors were *executed* long after the registration of the Government's deeds in 1896, but also that the only deeds in the defendant's entire chain of title which were recorded before that time were the deed from Elias to Rosenthal, recorded in 1890, and the deed from Swepson's widow to R. Y. McAden, recorded in 1888.

1. The reregistration of the Government's deeds in 1896 was authorized by the Connor Act, and its effect was to render those conveyances in the defendant's chain of title which were executed later, and those which were registered later though executed before, absolutely void, unless supported by other conveyances of earlier registration.

The correctness of this proposition has not been disputed. It is fully sustained by the face of the act (*supra*, p. 17) and by *Cowen* v. *Withrow*, 116 N. C., 771, approved in *Laton* v. *Crowell*, 136 N. C., 377, 380. This disposes of all of the defendant's conveyances except the two which were registered before 1896, namely, the deed from Elias to Rosenthal and the deed from Swepson's widow to McAden.

2. Unless either Rosenthal or R. Y. McAden was a bona fide purchaser for value without notice, actual or constructive, there is no conveyance to support the defendant's claim of title.

(*a*) The act by its terms protects only "creditors or purchasers for a valuable consideration."

See also:

Tyner v. *Barnes,* 142 N. C., 110, 113; 24 Enc. L., 120, and cases cited.

(*b*) And, as against conveyances made before December 1, 1886, it protects only those taking without actual or constructive notice. The language of the proviso is:

> That no purchase from any such donor, bargainor, or lessor shall avail or pass title as against any unregistered deed executed prior to the first day of December, one thousand eight hundred and eighty-five, when the person or persons holding or claiming under such unregistered deed shall be in the actual possession and enjoyment of such land, either in person or by his, her, or their tenants, at the time of the execution of such second deed, or when the person or persons *claiming under or taking such second deed,* had at the time of taking or purchasing under such deed actual or constructive notice of such unregistered deed, or the claim of the person or persons holding or claiming thereunder.

In *Cowen* v. *Withrow, supra,* the plaintiff claimed under a sheriff's deed dated December 3, 1888, given under executions based upon judgments against T. J. Withrow docketed on September 10, 1885, and later dates. This deed was registered December 11, 1888. The defendant offered a deed from T. J. Withrow dated August 5, 1882, and registered November 26, 1889, nearly a year

after the registration of the plaintiff's deed. The defendant also offered to prove that plaintiff knew of this deed at the time of his purchase. All this evidence on behalf of the defendant was excluded by the trial court. On appeal the Supreme Court held that the deed and the proffered testimony were competent and should have been admitted. It was contended by the plaintiff that the judgment creditors of Withrow acquired liens on the land attaching at the date of the docketing of their judgments, and that plaintiff, by becoming the purchaser at the execution sale, stood in the shoes of the creditors and was entitled to the benefit of the liens, which was answered by the court as follows (p. 775):

> We admit this proposition of law. But plaintiff got no more than T. J. Withrow had (granting that his deed is valid to pass title, and this is only admitted for this argument), and this was but the naked legal title, the equitable estate being in P. J. Withrow [*grantee of T. J.*]. And when her deed was registered in 1889 it became a perfect legal and equitable title and related back to the date of her deed (*Phifer* v. *Barnhart,* 88 N. C., 333) and wiped out all estate that T. J. Withrow had in said land, and also the interest plaintiff had acquired under his deed.
>
> And while we understand it to be admitted that this would ordinarily be the case, yet it is claimed that this case is an exception to this general rule. It is con-

tended that when the judgment of the *State* v. *T. J. Withrow* was docketed in 1885, the defendant, P. J. Withrow, could not have registered her deed. And this being so, the judgment liens attached and thereby took a priority. And this brings us to a consideration of the act of 1885, ch. 147. This act was ratified on the 27th of February, 1885, and provides in the fifth paragraph that it shall be in force from and after the first day of December, 1885. And it is further contended that section 1245 of *The Code* expired by limitation upon the adjournment of the legislature in 1885, and that there was no law authorizing the registration of any deed or other paper required to be registered from the adjournment of the legislature of 1885 until January, 1886, and that deeds dated prior to December, 1885, can not now be registered. This is an important question, not to say a startling one, to us, and if true will probably unsettle the title to 10,000 tracts of land in North Carolina. It would be most remarkable, if this is true, that we have lived for ten years without discovering so important a matter as this.

We are not prepared to yield our assent to this proposition. The act of 1885 certainly contemplated that the registration of deeds should go on. In the first section it provides that the provisions of this act shall not apply to deeds, etc., until the 1st of January, 1886. Why and what reason was there for postponing the application of

> this act, which was to place deeds on the same footing as mortgages and to make them invalid against an after-purchaser, who gets his deed registered first, if the owner of the deed had no right to have his "prior deeds" registered? Would it not be adding insult to the injury to notify the citizen that we will not apply the mortgage law to you until the first of January, 1886, but in the meantime we will not let you register your deeds and perfect your titles?

Laton v. *Crowell, supra,* from which we gave an extensive quotation earlier in the brief, is similar in principle but involves an application of that part of the proviso which protects unregistered conveyances held by persons in possession of the land.

This reduces the inquiry to the questions whether Rosenthal was a purchaser for value under the Elias deed, without actual or constructive notice of the Government's rights, and whether R. Y. McAden was such a purchaser under the deed from Mrs. Swepson.

3. Rosenthal was not a purchaser for value without actual or constructive notice.

We think this appears conclusively as a matter of law; but, if not, there was surely enough evidence to demand a submission of the question to the jury.

(*a*) In the first place, Rosenthal merely took the title (the naked legal title at most, *Cowen* v. *Withrow, supra*) in his own name for Swepson.

He was an impecunious clerk of Swepson's, who, if we are to believe the uncontradicted testimony of his brother, had never been in the vicinity of the land and to the time of his death earned barely enough money to keep soul and body together. Swepson's complaint in the suit against Olmsted, which resulted in the judicial sale, alleged that all the land had been acquired with Swepson's money and that the legal title was held by Olmsted pursuant to a contract which made Olmsted a dry trustee and left the full equitable estate in Swepson. He prayed that Olmsted be decreed to hold the land for him, but instead of following this with a prayer that Olmsted be compelled to make him a conveyance, which would have been the normal relief under the circumstances, he asked that he be compelled to sell the entire area of more than 89,000 acres, or that a commissioner be appointed to do so in his stead. Olmsted did not defend (the prompt execution of his quitclaim, *three* days after the sale, shows why) and the lands were thereupon knocked down by Swepson's own attorney to Swepson's own clerk. It needs no extended discussion to show that this whole proceeding was merely a cut-and-dried affair to get the legal title out of Olmsted and into Rosenthal in secret trust for Swepson—probably to delude his creditors—and the recital in the deed that a consideration of $40,000 was paid to the commissioner only serves to add color to the farce.

But this is not all of the evidence on the subject. Mrs. Swepson, after her husband's death, undertook by her proceedings in the probate court, culminating in her quitclaim to R. Y. McAden, to sell these very lands, or rather Swepson's interest in them, as a part of his estate, and Rosenthal, when, a year later, he came to convey to McAden's devisee, J. H. McAden, recited in the conveyance that it was made to carry out the purposes for which he, Rosenthal, had taken the title in the beginning. How it was possible for the learned courts below, under these circumstances, to regard Rosenthal as a *bona fide* purchaser for value passes our comprehension.

Could Swepson, having armed Olmsted with the legal title and the appearance of full beneficial ownership, have taken a conveyance from Olmsted directly to himself and then assumed the rôle of "purchaser" against Olmsted's grantees? The resumption of one's own title from one's agent or trustee could not constitute a purchase in the meaning of the recording acts unless they were concocted to encourage fraud.

As Swepson was no "purchaser," so Rosenthal was none.

Neither of them paid a valuable consideration.

(*b*) In the next place, it may be remarked that Rosenthal, even if he could be called a "purchaser," was either actually or constructively notified of the Government's rights. As the *alter ego*

of Swepson he was charged with knowledge of all of Olmsted's conveyances.

Furthermore, there is enough in the record of the case of *Swepson* v. *Olmsted* to put any purchaser on constructive notice, especially the purchaser who participated in those very proceedings.

Those proceedings on their face show that the lands which are mentioned in the complaint as having been conveyed by Olmsted to the Government were included in the lands sold to Rosenthal.

The complaint avers (R., 23) that the lands "hereinafter described" were purchased from the State by Swepson; that Olmsted contracted with Swepson "for all of said lands" *amounting to 89,532 acres;* that Swepson thereupon assigned his equitable title to Olmsted in order that the latter might obtain the legal title, upon an understanding that he would convey to the former such as he did not pay for; that Olmsted failed to pay for any of these lands except 32,000 acres, which, "as plaintiff is informed," he conveyed to the Government. An Exhibit "A" is then referred to as containing a description of "the said lands." The prayer is that "said lands" be sold (R., 24). The decree (R., 24) directs sale of "the lands mentioned in his complaint and marked Exhibit 'A,' *amounting to eighty-nine five hundred and thirty-two thousand acres* of land." The report of the commissioner (R., 25) is that he "has made sale of all of the lands mentioned and re-

ferred to in said decree." The confirmatory decree (R., 26) refers to the " lands in this cause " and directs a conveyance to the purchaser " for the lands aforesaid." The deed to Rosenthal (R., 28) follows the prior proceedings, and the deed from him to John H. McAden (R., 28) recites the prior deed as a deed for " about *89,532 acres.*"

From all this it was apparent that the acreage sold to Rosenthal included the acreage which the complaint showed had been sold to the Government. The fact, made much of in the defendant's brief, that the latter was misdescribed as situate in Graham County, seems immaterial.

When Olmsted obtained the land grants from the State in 1867, the counties of Macon, Cherokee, Jackson, and Clay had been established.

Clay County was carved out of Cherokee County by the act of February 20, 1861 (Laws 1860–61, ch. 6, p. 8).

Swain County was carved out of Macon and Jackson by the act of February 24, 1871 (Laws 1870–71, ch. 94, p. 155).

Graham County was carved out of Cherokee County by the act of January 30, 1872 (Laws 1871–72, ch. 77, p. 127).

The particular 5,000-acre tract involved in this case was entered in 1855 and is in that part of Cherokee County of which Clay County was subsequently formed. The 16 smaller grants made to Olmsted, under which the Hiawassee Lumber Co.

claims to have acquired title and which were located so as to overlap the 5,000-acre grant, are also in Clay County.

There is no means of ascertaining from the record the different counties in which the other lands granted to Olmsted are situated. In the deed made by Elias, commissioner, under order of the Macon County court, the lands were said to be in the counties of Cherokee, Macon, Swain, and Jackson.

It is probably true that of the numerous grants taken out by Olmsted there were some in each of these counties, but, however that may be, it is certain that the 5,000-acre grant involved in the present suit, and also the 16 smaller grants located so as to overlap the 5,000-acre grant, were located in Clay County when Elias made his sale.

The reference to Cherokee County in the grants from the State and the original deeds from the State's grantee is evidently due to the fact that at the time when the entries were made Clay County had not been created, and the grant and subsequent deeds merely adopted the descriptions contained in the entry papers.

Now, a purchaser is supposed to ascertain the location of the lands he buys; and he is charged with notice of the information contained in his title papers. See *Simmons Creek Coal Co.* v. *Doran,* 142 U. S., 417, quoting approvingly the

rule stated by the Virginia Court of Appeals in *Burwell's Adm'rs.* v. *Fauber,* 21 Gratt., 446, 463:

> Purchasers are bound to use a degree of caution in making their purchases or they will not be entitled to protection. *Caveat emptor* is one of the best settled maxims of the law and applies exclusively to a purchaser. He must take care and make due inquiries or he may not be a *bona fide* purchaser. He is bound not only by *actual* but also by constructive notice, which is the same in its effect as actual notice. He must look to the title papers under which he buys and is charged with notice of all the facts appearing upon their face or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information and then say he is a *bona fide* purchaser without notice.

To the same effect:

> *Washington Securities Co.* v. *United States,* 234 U. S., 76, 79.

If Rosenthal (or any of the subsequent purchasers) had taken the trouble to ascertain the *situs* of these lands, he would have learned that they lay in Clay County and not in any of the other four counties named in the Elias deed. From this fact, coupled with the suspicious appearance engendered by the Swepson-Olmsted record, including the failure of Olmsted to appear in that suit, arose a duty to inquire which, if com-

plied with, would have revealed the true situation. It was Rosenthal's manifest obligation, under the circumstances, to ascertain from Olmsted, and from an examination of the records of all the counties in which the lands were situate, what parcels Olmsted had conveyed. He should have asked the proper officials of the Government to inform him of the parcels conveyed to the United States. If he had made an actual examination of the records of Clay County, he would have found the deed from Olmsted to Stevens. If he had examined those of Cherokee County, he would have found both that deed (registered there in 1868, R., 10) and the deed from Stevens to the United States (registered there in 1871, R., 19).

In the opinion of the court below the proviso in the Connor act which speaks of *constructive* as well as actual notice is, practically, brushed aside. In the first place, the opinion treats the question of notice, as a whole, as though it were to be determined by the body of that act independently of the proviso. The act, as we have shown, did away with the significance of notice almost entirely for future cases, therein adopting the *rule* provided, in 1829, for mortgages. But the very object of the proviso was to protect past transactions against this change (*Laton* v. *Crowell, supra*). The opinion, though in places it seems to treat the question of notice as possibly material, comes always back to the proposition that notice, under the Connor act, is not material.

In the next place, where the opinion inquires into the value of the evidence on this point, there is an express refusal (R., 67) to apply the general doctrine laid down by this court in *Simmons Creek Coal Co.* v. *Doran, supra,* upon the ground that it is opposed by the law of North Carolina—i. e., the Connor act.

We submit that the words " actual or constructive notice " in the proviso are too clear for doubt. We have found no decision of the State court denying them their usual significance Furthermore, that court holds that where constructive notice exists it carries with it all the information that could be obtained by a careful inquiry. *Collins* v. *Davis,* 132 N. C., 106.

4. McAden was not a bona fide purchaser for value without actual or constructive notice.

(*a*) Much that we have said concerning Rosenthal applies here.

The property was designated in the proceedings under which he bought as included in the " interest of Geo. W. Swepson, deceased, in 131 tracts of land in Cherokee County." (R., 38.) Swepson held no title of record. A full inquiry was called for by this fact. If it revealed nothing, the conclusion would have been that Swepson had nothing to convey. If it revealed anything it could not have failed to inform McAden of the Swepson-Olmsted suit which, of course, would have placed him at once upon full inquiry to ascertain the extent of Olmsted's transactions. Also

if he had examined the records of Cherokee County, he would have found the two ancient deeds there registered.

(*b*) But a still more obvious reason why the defendant can claim nothing upon the ground of a supposed *bona fide* purchase of McAden will be found in the fact that in the contemplation of the registration acts McAden bought nothing. Neither Swepson nor his widow was clothed at any time with even the appearance of an estate in these lands, legal or equitable. The bare legal title at this time was held by Rosenthal under an unregistered deed.

CONCLUSION.

The judgment of the court below should be reversed.

Respectfully submitted.

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Assistant Attorney General.
S. W. WILLIAMS,
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FEBRUARY, 1915.

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INDEX.

Cases Cited.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 1028.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE HIAWASSEE LUMBER COMPANY.

In Error to the United States Circuit Court of Appeals For the Fourth Circuit.

BRIEF OF DEFENDANT IN ERROR.

(23603.)

This was an action of ejectment brought by the United States against the Hiawassee Lumber Company to recover the 5000 acres of land embraced in Grant No. 3110, situate in Clay County, N. C., and described by metes and bounds as set out in the complaint, Record, pp. 1-2; in said complaint the plaintiff alleges its ownership of said land, that the defendant is in the unlawful possession of said land and unlawfully withholds same from the plaintiff, to its damage in the sum of $1,000.00.

The defendant in its answer, Record, p. 4, denies the ownership of plaintiff of the land, and says that it (the defendant) is in possession of Tract No. 6687, by virtue of Grant No. 2984, which tract is lapped in part by the land claimed by plaintiff, as plaintiff contends its tract is located, but defendant denies that plaintiff's said tract can

be located at all: and defendant denies that its possession of said land is wrongful but avers that such possession is lawful and right under *bona fide* title, superior to any title in or claimed by plaintiff." It also admits that it is a corporation, and set up, by way of affirmative relief, that it is the owner in fee simple of said Tract No. 6687. Grant No. 2984, is in possession of same and that plaintiff claims some estate or interest in the land adverse to defendant, which is without foundation in fact or law and is injurious to defendant's title and possession.

Said action came on to be tried before Boyd, District Judge, and a jury upon the following issues, viz.:

(1) "Is the plaintiff the owner of the lands described in the complaint or any part thereof; if so, what part, and entitled to the possession of the same?

(2) Is the defendant in the wrongful possession of the said lands or any part thereof?"

Plaintiff, to make good its contention, introduced the following:

(*a*) Grant No. 3110 to E. B. Olmsted, dated November 10, 1867, registered in Cherokee County Nov. 9th, 1868, in Book K, page 561 (Record, p. 14). And the certificate of survey attached to the grant (Record, p. 15), purporting to show a survey of Tract No. 4500 *on Feb. 20th, 1854*, by J. B. Baker, C. S. (county surveyor) and Thos. Holland and J. C. Huskins, chain bearers (C. B.)

(*b*) A deed from E. B. Olmsted et ux. to Levi Stevens dated Feb. 7, 1868, (Record, 8-9), *purporting* to be registered in Clay County Feb. 23rd, 1869, in Book A, page 329: and registered in Clay County May 20th, 1896, in Book H, p. 61, conveying said tract of land.

(*c*) A deed from Levi Stevens et ux. to the United States of America, (Record, pp. 17-18), dated March 15th, 1869, *purporting* to be registered in *Cherokee* County Aug. 4th, 1871; registered in Clay County May 20th-22nd, 1896, in Book H, p. 67, conveying said 500 acre tract, and certain other tracts, not relating to any lands embraced in this action, but which are situate now in Graham County.

(*d*) Sixteen grants issued to E. B. Olmsted each for 640 acres (Record, p. 21), dated Nov. 10th, 1867, viz.:

GRANT	ENTRY	GRANT	ENTRY.
3008	6681,	3009	6682,
3010	6683,	3011	6684,
3012	6685,	3013	6686,
2984	6687,	2982	6656,
2998	6671,	3000	6673,
2970	6557,	2965	6550,
2999	6672,	3001	6674,
3002	6675,	2963	6541,

including the certificate of survey attached to each of said grants, the said entries having been made on May 16th, 1859, which were surveyed May 31 and June 1, 1859 Record, p. 21 and p. 39.

It was admitted that the descriptions in these grants embrace the lands described on the map as indicated by the entry numbers and grants marked and described thereon. (Record, p. 22).

(*e*) A map made by the surveyors, Shearer and Hayes, showing Tract No. 4500 in RED lines and said sixteen tracts in BLACK lines. (Record, p. 21).

Defendant claims the lands embraced in the black lines, under the said grants, and which came to them, after said grants were issued, as follows:

(*f*) Deed from K. Elias, commissioner, to A. Rosenthal, (Record, p. 27), dated Oct. 28th, 1882, registered in Clay County Oct. 17th, 1890, in Book F, p. 282; it conveys about 90 different grants situate in the Counties of Cherokee, Macon, Swain and Jackson, which are severally described by metes and bounds including said Nos. 3008, 3009, 3010, 3011, 3012, 3013, 2894, 2892, 2963, 3002, 3001, 2999, 2965, 2970, 3000 and 2998, *but does not include Grant No. 3110* for Tract No. 4500. This deed recites that it was made "by virtue of the decree of the Superior Court of Macon County, rendered at Spring Term, 1882, appointing, authorizing and empowering K. Elias, commissioner, *to make sale of the lands hereinafter mentioned and described;* and whereas, by virtue of the authority and power vested in me, as commissioner aforesaid, I did sell and make a report thereof at the Superior Court of said County at its Fall Term, 1882, which report was in all

things confirmed. At which time a further and final decree was made by the Court authorizing and directing me as commissioner aforesaid, to execute and deliver a deed of conveyance to A. Rosenthal, the purchaser." Therefore, etc.

As foundation for this deed defendant introduced a record from the Superior Court of Macon County, N. C, certified by W.N. Allman, clerk, and, under the seal of said Court, dated Oct. 25th, 1882. (Record, pp. 23, 24, 25 and 26), in a case entitled "G. W. Swepson v. E. B. Olmstead, showing complaint decree at Spring Term, 1882, signed by H. A. Gilliam, Judge, (Record, pp. 24, 25), reciting that "*a writ of summons has been duly executed on defendant and no defence was made to this action,*" and it was "ordered, adjudged and decreed that the plaintiff have and recover of the defendant the lands *mentioned in his complaint* and marked "Exhibit A," amounting to 89,532 acres. That defendant is trustee of plaintiff and holds said land as trustee for plaintiff's benefit, and it is ordered that same be sold, and out of the proceeds of sale the sum of $500.00 is to be paid to defendant, then pay costs and pay the residue to the plaintiff; and the lands conveyed to the purchaser; and K. Elias is appointed commissioner to make said sale, conveyance and payment."

A report is made to the Court at Fall Term, 1882, (Record, p. 25), showing a sale of the lands mentioned in the decree to A. Rosenthal for $40,000.00, that he is ready to pay it into Court upon confirmation of sale, and that he has paid the $500.00 to the defendant, Olmstead.

At Fall Term, 1882, Final Decree is made by Hon. Jas E. Shipherd, Judge, confirming the sale in all things and ordering the commissioner to make deed to Rosenthal upon payment of the residue of the money due the plaintiff. (Record, p. 26).

(*g*) A deed from E. B. Olmstead et ux. to A. Rosenthal dated Oct. 31st, 1882 (Record, p. 27), registered in Clay County Nov. 12, 1906, in Book M, page 337, quit-claiming all interest in all the lands set out in said deed from Elias, commissioner, to Rosenthal.

(*h*) A deed from A. Rosenthal et ux. to J. H. McAden, in trust for the heirs and devisees of Rufus Y. McAden, dated May 21st, 1889 (Record, p. 28), registered in Clay County, May 12, 1906, in Book M, p. 114, conveying all the lands embraced in the deed from Elias, Com., to Rosenthal, and from Olmstead and wife to Rosenthal.

(*i*) Certified copy of the Last Will and Testament of Geo. W. Swepson, devising all of his property to his wife, Virginia B. Swepson, dated July 14, 1882 (Record, p. 29, copy on pp. 32-33).

(*j*) Certified copy of a Special Proceeding in the Superior Court of Alamance County, entitled, "In the Matter of the Petition of Mrs. Virginia B. Swepson, Executrix, and sole devisee and legatee of George W. Swepson, dec'd" (Record, 29-38, inc.) A Petition is sworn to by Mrs. Swepson on Aug. 21, 1884, wherein, among other things, it is set out that the testator died indebted in the sum of about $400,000.00, that he devised all of his estate to petitioner and appointed her sol executrix of his will, that his personal estate amounted to about $6,000 and has been applied, as far as realized on, to costs of administration; that his equitable and legal real estate is situated in ten (designated) counties and is set out in an attached inventory; that the will contains no power to sell and asks for an order to sell so much of the real estate as may be necessary to pay hisdebts, with costs and charges of administration.

An order is made by the Clerk on Aug. 21st, 1884 (Record, pp. 33-35), finding the facts set out in the petition and adjuding it necessary to sell the whole of testator's lands to enable her to pay his debts, and authorizing and empowering her to sell the lands publicly or privately, for cash or on credit, and make report.

Report was filed by her Sept. 5, 1885, showing that after due advertisement according to law, she sold the lands at public sale at courthouse door in Graham, Alamance County, on Sept. 7, 1885, half purchase money in 6 months, balance in 12 months, with interest, to various persons, among them "Lot 53 to R. Y. McAden for $1,000.00: lots

8 to 53 inclusive, are encumbered with a mortgage of over $225,000.00, including interest." Record, p. 36.

Decree dated June 16, 1886, confirms the sale of Sept. 7th, 1885, and orders deeds to be made to the various parties, etc., and to this is attached an exhibit showing that "Lot No. 53" contains, among others, the said 16 grants under which defendants claim Record, p. 37.

(*k*) Deed from Virginia B. Swepson, Executrix, Devisee and Commissioner to R. Y. McAden, dated May 11th, 1888 (Record, p. 44), registered in Clay County, June 28th, 1888, in Book F, p. 130; Record, p. 38.

(*l*) Will of R. Y. McAden, dated Apl. 9th, 1889, devising these lands to J. H. McAden, Trustee, with power of sale, etc., Record, p. 38.

(*m*) Deed from Henry M. McAden, et als., children and devisees of R. Y. McAden to S. E. Cover and others, dated Feb., 1905 (Record, p. 38), registered in Clay County, Nov. 3rd, 1906, in Book M, p. 300.

(*n*) Deed from S. E. Cover and others to defendant, dated May 17th, 1906 (Record, p. 38), registered in Clay County July 8th, 1909, in Book P, page 221.

It is admitted that these conveyances cover the lands set out in the boundary claimed by the plaintiff, but by other tract numbers and grant numbers, and described by metes and bounds and the numbers set out in the Kope Elias deed. (Record, pp. 38-39).

(*o*) Defendants also introduced State Grant No. 2328 to G. W. Bristol, dated Dec. 20th, 1860 (Record, p. 39), for entry No. 2302, registered in Clay Co. June 12, 1862, containing 790 acres, and Grant No. 2325 to George Bristol, dated Dec. 20th, 1860, registered in Clay Co. June 26, 1862, and mesne conveyances bringing title into W. C. Walsh, all of record in Clay County, which is admitted to be located as shown on the map.

ARGUMENT.

We respectfully urge that the first and second assignments of error (Record, p. 71), are too general to be entitled to the serious consideration of the Court. The first

attempts to assign it as error that the Circuit Court of Appeals erred in affirming the judgment of the District Court; the second, that error was committed in not reversing that judgment and ordering a new trial.

THIRD ASSIGNMENT OF ERROR.

(Record, p. 72).

We do not understand the Circuit Court of Appeals to have ruled that the deed from E. B. Olmstead to Levi Stevens, dated Feb. 7, 1868, did not divest Olmstead of the legal title to the lands described therein.

At the close of the evidence defendant requested the District Judge to direct a verdict in its favor and the motion was granted after full argument upon the whole case. What the Court ruled is shown by the record sent up to the Circuit Court of Appeals and the exceptions taken thereto. When this deed was offered defendant objected to its introduction because of the void registration on Feb. 23rd, 1869. The Court admitted the deed under the registration of May 20th, 1896, and ruled that the registration of 1869 was invalid. (Record, p. 12). This ruling was affirmed by the Circuit Court of Appeals.

By reference to the Record, (p. 9), it will be seen that the record rejected was (1) the certificate of John S. Hollinshead, a commissioner of affidavits for North Carolina in and for the District of Columbia, that Olmstead and wife acknowledged this deed before him on Feb. 7, 1868; (2) the certificate of Wm. McConnell, Register of Deeds, of the registration of the deed in Clay County on Feb. 23, 1869.

There was no adjudication by the Clerk of the Superior Court of Clay County that the probate before the commissioner was in due form as was required by the law from 1868 until 1899, and no order to register the deed.

See Cozad v. McAden, 150 N. C., 206, where the Court says at foot of p. 209, "It has been uniformly held, since the enactment of the statute controlling this matter in 1868, when the acknowledgment of a deed, or other instru-

ment requiring registration, has been taken before some official outside the State, that in order to a valid probate, the deed, with a proper certificate, should be presented to the resident clerk for approval, and there should be an express adjudication by the local officer," and an order of registration.

This deed passed no title until properly registered on May 20, 1896, due registration being essential and taking the place of livery of seisin.

Hogan v. Strayhorn, 65 N. C., 279;
Olcott v. Bynum, 17 Wall., 44 at p. 58.

"This Court follows the decisions of the State Courts as to recording acts of the State, if there is a uniform course of decisions."

Townsend v. Todd, 91 U. S., 452;
Abraham v. Cosey, 179 U. S., 210;
Clarke v. Clarke, 178 U. S., 186-190,
and authorities there cited.

The point involved is further discussed elsewhere in the brief. The probates involved in this case are so admirably discussed by his Honor, Judge Pritchard in his opinion herein, (see pages 61 and 62 of the Record), that we feel that it would be entirely unnecessary for us to attempt to add to what is there said; and the citation of North Carolina authorities there given contains a correct compilation of the law upon the question of probate.

FOURTH ASSIGNMENT OF ERROR.

(Record, p. 72).

Plaintiff contends that Chapter 32 of Public Laws of 1869-70, which is set out at the top of page 69 of the Record, cures the defective probate of the deed from Olmstead to Stevens, as well as of the deed from Stevens to the plaintiff. There was *no probate* of either deed without the adjudication of the clerk and his order that it be spread upon the records.

Cozad v. McAden, *supra.*

"The register has no authority to put the deed upon

his books unless proved and so adjudged in some one of the modes prescribed by the statute. The probate is his warrant for doing so, and without this warrant it does not create such an equity as to affect creditors or subsequent purchasers."

Evans v. Etheridge, 99 N. C., 43 and cases there cited.

The manifest purpose of this statute was to admit to registration deeds that were defectively proven; not to supply a probate where there was none at all. Chapter 23 of the Laws of 1876-77, which is also set out in full on page 69, does not apply for the same reason, and for the additional reason that these deeds were not properly registered within two years from their respective dates. nor until 1896. In the meantime the deed from K. Elias, commissioner, to A. Rosenthal, under which defendant claims, dated Oct. 28, 1882, was registered in Clay County, the county in which the land in controversy is situated, on Oct. 17, 1890 (Record, p. 27), and thus the legal title to the lands vested in those under whom defendant claims, and that without notice of plaintiffs' deeds. This act only applies to deeds *not registered.*

It will be noticed that the original deeds from Olmstead to Stevens and from Stevens to the plaintiff, (Record, p. 8 and Record, p. 17), were introduced, and there can be no suggestion that an order of registration might be preserved in the effort to cure the defective probate. No such order appeared on the original deeds or elsewhere. The fact is that the deeds were never ordered to record until May 14-20, 1896. (Record, p. 10 and p. 19).

Brown v. Hutchison, 155 N. C., middle of p. 208; Hallyburton v. Slagle, 130 N. C., 482.

In McNeill v. Adam, 146 N. C., end of opinion on page 285, it is laid down that:

"Revisal, Sec. 980, does not apply where the sealed instrument was executed prior to 1 Dec., 1885. The rights of the parties will be determined by the law as it stood prior to the enactment of Chapter 147, Laws of 1885."

In Isler v. Foy, 66 N. C., middle of page 551, the Court said:

3. "That the execution of the deed from Harrison to Foy, which was in 1860, and not registered until 1868, did not relate back to its date, so as to pass the title against the plaintiff."

This was the proposition before the Court and the Court said:

"We find it decided that by virtue of the various acts which have been uniformly passed once in every two years, extending the time for the registration of deeds, a registration at any time, relates back to the delivery of the deed, and makes it valid from that time; unless between its delivery and registration some period occurred during which a lien was acquired available to a purchaser under execution."

Scales v. Fewell, 3 Hawks 18;
Hills v. Jackson, 9th Ired., 333.

In this latter case it was held:

"The passage of the several Acts of Assembly enlarging the time within which grants shall be registered makes them good and available by relation back from the time when they are dated, as much so as if they had been registered within two years."

In Phillip v. Hodges, the point was made that the act of 1885 would be unconstitutional, if the effect of it would be to divest from P. W. Phillips in 1885, of an estate which vested in her by deed in 1852.

The Court replied to this argument by saying:

"The error of counsel is in overlooking the fact that but for the act of 1885, and the various successive acts after two years from April, 1852, extending the time for registration, the deed to Phillips and wife would have conveyed no legal title unless registered within two years from April 2, 1852." (April 2nd was the date of the deed).

In McCall v. Wilson, 101 N. C., foot of page 601, the Court discusses the practice of continuing the time for registering deeds by the General Assembly, and refers to Sec. 1279 of the Code, which went into effect Nov. 1, 1883, by which two years longer was given to register

deeds. It is a fact that no subsequent statute gave any extension of time for registering deeds except the proviso contained in Sec. 990 (Chap. 147, Acts of 1885), and that statute does not profess to cover the case now before the Court.

FIFTH ASSIGNMENT OF ERROR.

(Record, p. 72).

What we have said in discussing the third and fourth assignments of error applies to this assignment of error, as to the effect of the deed from Stevens et ux. to the plaintiff, dated March 15, 1869, and we beg that it may be so taken without repeating.

It is settled in North Carolina that an unauthorized registration is neither actual nor constructive notice to purchasers.

Todd v. Outlaw, 79 N. C., 235;
Lance v. Tainter, 137 N. C., 250;
Smith v. Fuller, 152 N. C., 13;
Piano Co. v. Spruill, 150 N. C., 169;
Cozad v. McAden, 148 N. C., top p. 13;
Johnson v. Lumber Co., 147 N. C., foot p. 250.

SIXTH ASSIGNMENT OF ERROR.

(Record, p. 72).

Plaintiff contends that Rosenthal took title to said sixteen tracts of land now owned by defendant with constructive notice, as well as actual notice, that the land now in question had been conveyed to Levi Stevens, and to the United States by Stevens. This we deny, for the reason that, until May 20th, 1896, no notice to that effect was given by the abortive registration of the deeds of 1868 and 1869.

"No notice, however full and formal, can supply the notice by registration, required by law."

Tremain v. Williams, 144 N. C., 114;
Quinnerly v. Quinnerly, 114 N. C., 145.

"The register has no authority to put the deed upon his books unless proved and *so adjudged* in one of the modes prscribed by statute."

Evans v. Etheridge, 99 N. C., 43-48, citing
Todd v. Outlaw, 79 N. C., 235;
Bernhart v. Brown, 122 N. C., 591 and citations.

The adjudication upon the certificate of the commissioner by a proper officer is indispensable.

Johnson v. Lumber Co., 147 N. C., 249;
Cozad v. McAden, 150 N. C., 206-209.

But, suppose Rosenthal, who paid $40,000.00 for the land be bought under the Court's decree, (see recital in Elias' deed at page 27 of the Record), had bought with notice of the recitals in the deed from Olmstead to Stevens—what would he have discovered? Simply that Olmstead had conveyed a 5,000 acre tract of land to Stevens, situate and described as set out in that deed (Record, p. 8). There was nothing to indicate to him that any of the tracts he was buying affected it in any wise—the tracts he was purchasing were 640 acre tracts, and nothing appears in the record to indicate that there was any interference, the one with the other.

In the deed from Stevens to the United States the same things were disclosed, with this additional fact to his comfort. The same boundary was set out *and the Grant No.* 3110 *plainly appeared;* an inspection of that grant disclosed that it issued upon Entry No. 4500, whereas he was buying Tracts Nos. 6687 and others, Grants Nos. 2984 etc., which were altogether different tracts, and the grants were superior to Grant No. 3110, and were based upon surveys of property made, whereas Grant No. 3110 issued upon no valid survey, as we will discuss later.

He would have found out also that the 32,000 acres, likewise included in the Stevens deed, were in an entirely different county, viz., "Graham" (Record, p. 24). The only evidence in the record (or anywhere else, for that matter), is in the complaint (Record, p. 24), which plainly states that this 32,000 acres, "which are situated in Stecoah Township, in the County of Graham, No. Ca." By every rule of construction the grant, No. 3110, must be

construed to contain 5,000 acres alone, and to be no part of the 32,000 acres in Graham County. From all of which it must be apparent that, if the contention of plaintiff is correct, Rosenthal would have found nothing by the most thorough search of everything disclosed by plaintiff's deed to put him on notice that the title to these 16 tracts was defective.

Let us call the Court's attention to the following cases bearing upon notice:

Robinson v. Willoughby, 70 N. C., 358;
Allen v. Bolen, 114 N. C., 560;
Hooker v. Nichols, 116 N. C., 157;
Collins v. Davis, 132 N. C., 109.

SEVENTH ASSIGNMENT OF ERROR.

(Record, p. 72).

While the Circuit Court of Appeals did not hold that the plaintiff "was bound to again record the deeds under which it claims within the period imposed by Chapter 147 of the North Carolina Laws of 1885," we submit it might properly have so held.

This act, which is set out in full on page 63 of the record, and is Section 980 of The Revisal of 1905, has been uniformly held to be constitutional. The plaintiff stands in the same attitude in this case as an individual claiming this land.

When the United States comes to the Federal Courts to litigate with one of its citizens, it must submti to the rules of practice and procedure of its Courts, and its rights and privileges at every stage in the trial of the cause are substantially in every respect the same as those of the citizen and it cannot have any superior advantages.

Fink v. O'Neil, 106 U. S., 272;
U. S. v. R. R. Co., 105 U. S., 263;
U. S. v. Thompson, 93 U. S., 586;
Carr v. U. S., 98 U. S., 433.

"A state legislature may pass a recording act by which an older grantee will be postponed to a younger,

if the earlier deed is not recorded within a limited time, without impairing the obligation of any contract."

Jackson v. Lamphire, 3 Pet. 280.

"This Court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect."

Terry v. Anderson, 95 U. S., 628.

See also McGahey v. Virginia, 135 U. S., at p. 705.

EIGHTH ASSIGNMENT OF ERROR.

(Record, p. 72).

We cite Jackson v. Lamphire, 3 Pet. 280 as an answer to this assignment, viz.: the quotation made just above.

NINTH ASSIGNMENT OF ERROR.

(Record, p. 72).

Plaintiff insists that Rosenthal had actual notice of the transfer of this land.

We cannot see the force of the contention that actual notice was given, as contended by plaintiff, referring to pages 41 and 42 of the Record. We do not in any wise admit that actual notice would supplythe place of registration, in view of the citations quoted above. We merely call the Court's attention to the total failure to bring the "notice home" either to Rosenthal or Swepson other than the statement of the editor of a paper published in 1880, that Mr. Swepson was a subscriber to the paper "to the best of my knowledge and belief." (Record, p. 41). We submit that this is far short of what is required to prove actual notice.

If they had produced a witness who testified that he had seen either or both of those gentlemen, "in slippered comfort" reading the notice which appears on pp. 41 and 42 of the Record—we submit that said notice does not make mention of a single tract or grant that was claimed or owned by them, or in which they ever became interested by any subsequent purchase or proceeding.

Besides, we submit that actual notice would not have sufficed, for that registration was indispensable.

Hinton v. Leigh, 102 N. C., 28;
Tremain v. Williams, 144 N. C., 114;
Collins v. Davis, 132 N. C., 106;
Blalock v. Strain, 122 N. C., 283;
Patterson v. Mills, 121 N. C., 267.

TENTH ASSIGNMENT OF ERROR.

(Record, p. 72).

On pages 23, 24, 25 and 26 of the Record will be found the certified copy of the record of the case of G. W. Swepson against E. B. Olmstead. The lands are stated in the complaint to be 89,532 acres and were described in an Exhibit to the complaint marked "A," which is apparently lost. The proceedings constantly refer to the lands as containing 89,532 acres. In the decree Elias is appointed commissioner "to sell the *aforesaid* lands;" Record, p. 25. He reports (Record, p. 25), that he "made sale of all the lands mentioned and referred to in the decree," and that the purchaser was ready to pay the amount of his bid ($40,000.00 less $500.00 already paid in) when the sale was confirmed. At the same term final decree (Record, p. 26) refers to them as "the lands in this cause," and orders deed to be made upon payment of balance due. And on Oct. 28, 1882 (Record, p. 27), the commissioner, "the hand of the Court," makes a deed, replete with exact references to the proceeding and record, and after reciting the authority of the decree, his sale of the land, report and final decree, he conveys these identical lands, by metes and bounds. *And* three days later, Olmstead and wife, he being the defendant in that action, ratify and approve the whole matter, including service of process and description of the lands, by executing and delivering to Rosenthal, (Elias' grantee), a quitclaim deed for the same land. Surely this will be held to be "fitting the description to the thing" in this collateral attack. Olmstead did not complain of the identity of the lands; instead he endorsed and approved all that had been done.

It will be noticed that this sale was about 31 years ago. And also that the action was begun at Spring Term, 1882, of Macon Superior Court and closed at Fall Term, 1882. The inference is strong that the identity of the lands was not in the last uncertain at any time.

In Williams v. Harrington, 33 N. C., 616, will be found an apt authority. By a decree of the Court of Equity, the Clerk and Master sold certain lands of plaintiff's ancestor "as the lands of the deceased debtor lying in Moore County;" deed was made reciting the sale, advertisement and other details and conveying the lands to the purchasers named by metes and bounds. Objection was made that the description of the lands was not specific enough, it being shown that the records of that county had been destroyed; Ruffin, C. J., delivered the following opinion on that point, on p. 622 of that opinion:

"The Court cannot suppose that the petition and decree did not describe the land more particularly than 'as the lands of the deceased debtor lying in Moore County;' for no respectable counsel would draw pleadings nor the Court decree in such terms. It was probably thus stated by the witness, because, after the destruction of the papers, they were unable to repeat the particular words or do more than give the substance. But, if it were otherwise, the decree, though less precise than usual, would not be so very vague as to be ineffectual, *when taken in connection with subsequent proceedings.* It would then be as particular as a *fieri facias* on a judgment against heirs, which runs against the lands descended from the debtor: and they are identified by the sale and sheriff's deed. *Here any defect as to the certainty of the land is cured by the report of the Master of the sales of the several parcels, and their ratification, and the order of the Court to the Master to convey this particular tract to the defendant. So it appears that there could not be a mistake as to the identity of the land intended and ordered to be sold, and that actually sold.*"

This case is cited and approved in Millsaps v. Estes, 137 N. C., near foot of page 544.

To the same effect as to identification is Brown v. Coble, 76 N. C., 391.

Judicial sales cannot be collaterally attacked for irregularity.

McGlawhorn v. Worthington, 98 N. C., 199-202, and cases there cited.

A purchaser is only required to know that the Court had jurisdiction of the subject matter and the parties, Cord v. Finch, 142 N. C., 140, middle of p. 146. He has the right to look to the Court to protect him. Carraway v. Stancill, 137 N. C., 476.

Superior Courts of North Carolina at the time the decree in question was rendered, possessed the same powers and equitable jurisdiction as Courts of Equity had prior to 1868, when the distinction between actions at law and suits in equity was abolished by the State Constitution of 1868, and the Code of Civil Procedure then enacted by the Legislature of the State.

Tate v. Mott, 96 N. C., 22;
Setle v. Settle, 141 N. C., foot of p. 562.

ELEVENTH AND TWELFTH ASSIGNMENTS OF ERROR.

(Record, Pages 72-73).

We have heretofore argued, that registration was essential and was indispensable in discussing the sixth assignment of error. Without repeating that argument we ask that it be taken as applicable to the eleventh assignment of error.

As to the twelfth assignment, Rosenthal could not have been affected with notice of the claim of the plaintiff by reason of the recital in the complaint in Swepson v. Olmstead, "of 32,000 acres of land therein recited to have been conveyed by Olmstead to the United States." On page 24 of the record will be found the allegation as to this land. It is distinctly alleged that this 32,000 acres lie in Stecoah Township, Graham County; whereas, the land in question lies in Clay County.

But suppose Rosenthal, who paid $40,000.00 for the land he bought, (see recital in Elias' deed at p. 27 of Record), had bought with notice of the recitals in the deed from Olmstead to Stevens,—what would he have discovered? Simply that Olmstead had conveyed to Stevens a 5,000 acre tract of land, situate and described as set out in that deed. (Record, p. 8). There was nothing to indicate to him that any of the tracts he was buying affected it in any wise; the tracts he was purchasing were 640 acre tracts; of entirely different boundaries: and nothing appeared to indicate that there was any interference of the one with the others.

THIRTEENTH AND FOURTEENTH ASSIGNMENTS OF ERROR.

(Record, p. 73).

At the close of the evidence defendant asked the trial Judge to direct a verdict in its favor upon the issues, which motion was granted. Upon this the whole case was argued, and we think we can present our views upon the 13th and 14th assignments together.

These lands are what are known as entered lands under the Cherokee Land Law, which is found in Vol. II. of The Code of 1883, Section 2464 et seq., and is Chapter 119 of The Acts of 1852-53. By Sec. 2 of that Act, The Code, Sec. 2645, any unsold land in Cherokee County might be entered at certain periods between Feb. 1st, 1853, and Sept. 1st, 1854, at prices set out in the Act, and thereafter at the same rates as other vacant lands in this State. Enterers were required to file bonds payable to the State in four annual instalments and upon proof of entry and payment the Secretary of State shall issue the grantor grants according *to the entry and survey theron*. Chap. 119, Sec. 3, The Code of 1883, Sec. 2466.

Pub. Laws of 1852-'53.

The method of making entries was the same as that provided by the Act of 1777, Chap. 114, Sec. 5, and the Act of 1783, Chap. 185, Sec. 11 (The Code, Sec. 2765), which required the claimant to produce to the entry-taker

a writing signed by him, setting forth where the land is situated, with the lines of other persons, if any, and other remarkable objects and places serving to identify the entry; this writing was required to be on one quarter-sheet of paper at least, and endorsed by the entry-taker, with its date and acreage. A copy was to be entered in a book, properly ruled and spaced, and each space to contain one entry only, and every entry to be made in the order of time it was received, and *numbered in the margin*. After posting notice of entry for ten days and no protest being made to it, a warrant of survey was to issue.

One Arthur M. Dyck entered 5,000 acres of land in Cherokee County on Dec. 30, 1854, by an entry No. 4500 (Record, p. 15), which is the foundation of plaintiff's title. This entry, according to the testimony of Holland and Huskins, (Record, p. 22), was never located and surveyed until the year 1867, when they swear they helped Hennessee, the deputy surveyor of Cherokee County, to survey it; indeed, the warrant of survey never issued until April 8th, 1867. (Record, p. 16), authorizing a survey of said entry.

On the 16th of May, 1859, the sixteen entries, which are numbers 6687 and so forth, under which defendant claims, were laid, and on the 31st of May and 1st of June, 1859, said entries were duly surveyed. (Record, foot p. 39).

Sixteen grants, dated Nov. 10, 1867, issued to E. B. Olmstead on the said 16 entries, which are numbered 2984 and other numbers to and including No. 3013. And on the same day a grant numbered 3110 issued to said Olmstead upon Entry No. 4500, which is the 5,000 acre tract claimed by plaintiff.

Defendant contends that, under the Acts of 1777 and 1783, *supra*, the *entry* is the unit, or designated standard of individuality of these lands, and that when an entry is laid, thereafter the legal title follows the entry, provided, of course, a grant be taken out. And where there is a lap-page of certain entries upon other entries, the legal title is to be ascertained from the oldest grant.

Andrews v. Mulford, 2 N. C., 311, and many later cases, including:

Hoover v. Thomas, 61 N. C., 184;
Gilchrist v. Middleton, 108 N. C., 705;
Rowe v. Lumber Co., 129 N. C., 97;
Newton v. Brown, 134 N. C., 437;
Stewart v. Keener, 131 N. C., 486;
Janney v. Blackwell, 138 N. C., 437;
Berry v. Lumber Co., 141 N. C., 386.

Anderson v. Mulford, *supra,* was decided in 1796 and holds that where two grants were issued on the same day for the same land, that grant bearing the smallest number is presumed to be completed first. On p. 319, is the following: "He who first obtains his grant without fraud, obtains title; *and from that moment* may exclude others from the possession. * * * *Other influences in determining preferences cease from the moment of its execution to be of any consideration.*"

This case was cited with approval on this point in Tyrrell v. Mauney, 5 N. C., 401, at p. 403.

And defendant contends that E. B. Olmstead acquired the first title to Tracts Nos. 6687, etc., by the issues of Grants Nos. 2984, etc., to the land, which seems also to have been granted to him later as Tract No. 4500, Grant No. 3110—a grant about a hundred numbers larger than 2984. etc., and that the law presumes that the officers first completed the grants numbered 2984, etc., before completing the grant numbered 3110. And defendant contends that the older legal title comes down to it in an unbroken chain from that moment.

"If one procure a grant for land covered by a grant. he acquires no title thereto for the reason that the State has by the senior grant parted with its title."

Stanmire v. Powell, 35 N. C., 312, approved in Janney v. Blackwell, 138 N. C., at p. 439.

It will be noticed that the deed from Levi Stevens and wife to the plaintiff specifically says that he conveys certain parcels of land conveyed by the State to E. B. Olmstead, towit: *"Grant No. three thousand one hundred and ten containing five thousand acres,"* bounded exactly as in said grant and in the deed from Olmstead to him; he doesn't mention any other grant as embracing that boun-

dary. Certainly he doesn't purport to convey any part of the sixteen grants under which defendant claims.

An inspection of the certificate attached to the plaintiff's grant, No. 3110, discloses the fact that it issued without a survey. Said certificate purports to have been made pursuant to a survey on Feb. 20th, 1854 (Record, p. 15), with Holland and Huskins as chain bearers. They both testify that they were not present at a survey of this land in 1854 (Record, p. 22). They say they were chainbearers at a survey made by one Hennessa, a deputy surveyor of Cherokee County, in 1867—but no such certificate appears in the record.

Grant No. 3110 appears to have been issued upon certificate of a survey that was never made; or, to state it differently, to have issued without any survey. We respectfully submit that this vitiates the grant, and, as authority for this position, we cite the opinion of the Court in Harris v. Norman, 96 N. C., 59. Merrimon, C. J., speaking for the Court, says:

"The statute (The Code, Sections 2751-2788), prescribes what lands of the State shall be the subject of entry and grant, and, with much particularity and detail, how entries *shall* be made and grants issued. An entry-taker for each county is provided for and his duties prescribed. * * * A surveyor for each county is also provided for. The person claiming land is required to make application in writing in a designated way, and a copy of the application must be entered in a permanent entry-book. * * * A copy of it with an order of survey *must* be sent to the county surveyor, and he is required to "lay off and survey" the land, and make "thereof two fair plats," the scale whereof shall be mentioned on such plats, etc."

(It will be noted that a warrant of survey issued to the sheriff of *Cherokee* County on Apl. 8, 1867 (Record, p. 16), but no certificate of survey appears to have been made under it, nor any legal survey at all).

Further on in the opinion we read at p. 62: "The entry, the copy thereof, the warrant of survey, *the survey, and the plats thereof required*, filed with the Secretary of State, constitute the essential ground-work of the grant,

and are necessary to enable the Governor and Secretary of State to exercise authority to issue it. *These things give it life and are essential to its validity—without them it is inoperative and void.*"

Clay County was established by Chap. 6, Public Laws of 1860-61, ratified Feb. 20th, 1861. Thus, we have an entry made Dec. 30th, 1854, in Cherokee County; surveyed in Clay County by Cherokee officers six years after Clay was created, no certificate thereof being made, pursuant to a warrant of survey issued Apl. 8, 1867; the grant for which issued upon an alleged survey dated ten months prior to the date of entry, and the chain bearers swear that they assisted in no survey like that set out.' It was admitted that plaintiff had no other evidence of -he alleged survey of 1867; and it was proven that the alleged signature of Hennesa was not in his handwriting and that J. B. Baker was not surveyor of Cherokee County at that time, nor at any time, nor was such a man known in either of said counties. The conclusion of this whole matter was such that all reasonable and unprejudiced men would be bound to reach the same conclusion, namely, that this alleged certificate of survey was a plain, simple *forgery;* and the trial judge would have been abundantly justified in so ruling and instructing the jury. Indeed counsel for plaintiff did not insist that the certificate attached to that grant was genuine. It is plain, however, that the Governor and Secretary of State were deceived by it. At the trial plaintiff's counsel seemed to abandon their grant and to attempt to hold the land under the 16 grants aforesaid. While it may be true, as between Olmstead and the United States, that the latter could hold this 5,000 acres under the said 16 grants upon failure of title by Grant No. 3110, if Olmstead still owned said 16 grants, it cannot be seriously contended that defendant is to lose said 16 grants under the circumstances of this case. Defendant does not claim under Grant No. 3110, nor did his predecessors in title claim the land under that grant; Elias, the commissioner, did not sell or convey it. But he did convey the 16 grants to Rosenthal by deed dated Oct. 28th, 1882, which was duly registered in Clay County Oct. 17th, 1890, in Book F, page 282—six years before the registra-

tion of the plaintiff's deed from Olmstead and also from Stevens. Now Rosenthal paid $40,000.00 for the land, *which constituted him a purchaser for value,* as we contend. There was no possession of Tract No. 4500, to put him upon inquiry. It was plaintiff's duty to properly register its deeds by Jan. 1st, 1886, in order to get the benefit of either Chap. 147, Laws of 1885, or show by evidence sufficient to bring it within the *proviso* of that Act. Neither did it register said deeds within two years from the respective dates thereof in 1868; on the contrary, it permitted its deeds to be unregistered until May 20th, 1896. In the meantime, Rosenthal's deed was registered in 1890, and plaintiff lost any advantage it might have had by reason of having a prior deed. It remained no longer lawful for plaintiff to seek to avail itself of the provisions of any former law, anterior to said Chap. 147, Acts of 1885, nor could registration in 1896 relate back to the date of plaintiff's deeds.

Halyburton v. Slagle, 130 N. C., 482;
Brown v. Hutchinson, 155 N. C., 205.

This last case seems to us decisive of the case at bar. Its citations bear strongly upon the registration laws of North Carolina. It emphasizes the rule that a deed "*shall not be valid against purchasers except from the registration thereof.*" It shows clearly that the rule of a deed's relating back to its date after registration (as laid down in Phifer v. Bernhardt, 88 N. C., 333, cited by plaintiffs) does not apply, since the passage of Chapter 147, Acts of 1885, where a junior deed has been registered—and that such junior deed has priority over the senior deed, because registered first. (See page 208 of that opinion).

Upon this question of deeds, executed prior to 1885, and registered after Jan. 1st, 1886, having relation back to their date, we desire to call the Court's attention to the case of Phillips v. Hodges, 109 N. C., 248, where defendant asked the Court to charge "That the deed dated Apl. 2nd, 1852, not having been registered until 11th January, 1886, passed no title * * under Acts of 1885, Chap. 147, Sec. 1." The Court so held and judgment was affirmed. Davis, J., speaking for the Court, said, p. 251: "The

unregistered deed did not pass the legal title, but only the equitable title, to be perfected by registration. Davis v. Inscoe, 84 N. C., and cases cited. * * * The counsel for plaintiff says the deed, when registered, related back to its execution, and the Act of 1885 would be unconstitutional if the effect of it would be to divest from P. W. Phillips, in 1885, an estate which vested in her by deed in 1852." The error of counsel is in overlooking the fact that but for the Act of 1885, and the various successive Acts after two years from April, 1852, extending the time for registration, the deed to Phillips and wife *would have conveyed no legal title unless registered within two years from Apl.* 2, 1852.

Registration is required for the protection of innocent purchasers for value and creditors, and to prevent frauds, and the legislature did not think it wise to *extend the time for registration* after January 1st, 1886, so as to give legal validity to deeds, as against innocent purchasers and creditors."

The citation in plaintiff's brief, McNeill v. Allen, 146 N. C., 285, does not apply in this case, for the reason that defendants in that case were *in possession* from 1873, continuously ever since, under bond to make title, and were clearly within the *proviso* of Chap. 147, Laws of 1885.

As heretofore stated, Rosenthal paid $40,000.00 for the land, as recited in the deed of the commissioner (Record, p. 27). In the absence of evidence of the full value of the lands he bought in 1882, we submit that this sum is enough to constitute him a purchaser *for value* under the rule laid down by the Supreme Court. "'Purchaser for value is one who pays such a fair consideration as is not up to the full price, but a price which would not cause surprise, or make anyone exclaim 'he got the land for nothing, there must have been some fraud or contrivance about it.'"

Worthy v. Caddell, 76 N. C., 82;
Collins v. Davis, 132 2N. C., 106-110;
Printing Co. v. Herbert, 137 N. C., 317-320.

We hear no complaint about this out of Olmstead, the owner of the land. On the contrary, he made no com-

plaint, when, three days after the date of Rosenthal's deed, he made a quit claim deed to Rosenthal for these identical lands. (Record, pp. 27-28).

Upon the record and opinion of Judge Pritchard and the authorities here cited, we respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

JAMES H. MERRIMON,

MARSHALL W. BELL,

Attorneys for Defendant in Error.

UNITED STATES *v.* HIAWASSEE LUMBER COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 133. Argued March 2, 1915.—Decided June 21, 1915.

In an action of ejectment brought by the United States to recover a tract of land in North Carolina, the result depended upon the validity of the probate and registration of the deeds under which the Government claimed title, and after reviewing and construing the various statutes of the State regulating such probate and registration, *held* (a) that the deed to the grantor of the United States, made in 1868, was validated as to probate and registration by an act of January 27, 1870; and (b) that the deed from this grantor to the United States, made in 1869, was admitted to registration, without limitation as to time, by force of the Connor Act of 1885 of North Carolina, and when so registered was made valid to pass title by the terms of the same act.

202 Fed. Rep. 35, reversed.

THIS was an action of ejectment brought by the United States against the Hiawassee Lumber Company in the Circuit Court of the United States for the Western District of North Carolina to recover a tract of land situate in Clay County, in that District and State, described as

follows: "Grant No. three thousand, one hundred and ten, containing five thousand acres, and beginning at a chestnut on the top of Tusquita Ball [Tusquita Bald] on the Mason County Line, and runs east three hundred and twenty poles to a chestnut on a mountain side, thence south seven hundred poles to a pine, thence west twelve hundred and forty poles to a stake, thence north seven hundred poles to a stake and hickory, thence east nine hundred and twenty poles to the beginning." Defendant's answer denied generally the allegations of the complaint, set up possession and title in itself to a part of the tract, and demanded judgment that it was the owner and entitled to the possession of said land. The trial court directed a verdict in favor of defendant, and the resulting judgment was affirmed by the Circuit Court of Appeals (202 Fed. Rep. 35).

From the bill of exceptions it appears that both parties claim under one Edwin B. Olmsted, who derived title to the lands from the State of North Carolina by certain grants dated November 10, 1867. One of these is Grant No. 3110, for 5,000 acres, described as in plaintiff's declaration. There are 16 other grants, each for 640 acres, the tracts adjoining each other in such manner as to form a quadrangle that admittedly includes the land claimed by plaintiff as well as much land besides. Plaintiff claims through deeds purporting to convey the 5,000 acre tract as described in Grant No. 3110. Defendant claims under a series of conveyances purporting to convey the 16 tracts of 640 acres each. So far as the bill of exceptions shows, there was no evidence of possession on either side, and the question turns upon the paper titles.

Plaintiff's chain of title is made up of the 17 grants to Olmsted and two deeds of conveyance. The first deed is dated February 7, 1868, made by Edwin B. Olmsted and wife, of the City of Washington, District of Columbia, to Levi Stevens, of the same City and District, pur-

porting to convey the 5,000 acre tract in question. It was acknowledged in due form on the day of its date in the District of Columbia by Olmsted and wife (she being privately examined), before John S. Hollingshead, a commissioner for the State of North Carolina in and for the District of Columbia. Besides the certificate of acknowledgment, it bears the following indorsements: (a) One showing that it was recorded December 14, 1868, in the land records for Cherokee County; but this may be disregarded, since it is not questioned that the lands described in the deed lie in Clay County, which was formed out of a portion of Cherokee in the year 1861. (b) Next is a certificate by the Register of Clay County that the deed was "duly registered in the register's office of Clay County" on February 23, 1869, mentioning the book and page. (c) Next is a certificate dated May 20, 1896, made by the clerk of the Superior Court of Clay County, stating that the certificate of Hollingshead, commissioner, "having been exhibited before me with the seal of his office attached, the same is adjudged to be in due form and according to law. Therefore let the foregoing instrument with all the certificates be registered." And, finally, there is a certificate of the registration of the deed on May 20, 1896, in Clay County.

The second deed is dated March 15, 1869, made by Stevens and wife, of Washington, D. C., to the United States, purporting to convey certain tracts granted by the State of North Carolina to E. B. Olmsted November 10, 1867, and describing 45 different tracts, one of which is the 5,000 acre tract in question. This was duly acknowledged by Stevens and wife before a commissioner for the State of North Carolina in and for the State of Pennsylvania on March 15, 1869. It was registered in Cherokee County August 4, 1871; but this is immaterial so far as its effect upon the lands in Clay County is con-

cerned. It was not registered in the latter county until May 20, 1896, and it was then registered after compliance with all the requirements of law.

Testimony was introduced on both sides upon the question of location; a map was introduced purporting to show the location of the 5,000 acre tract, and of the sixteen 640 acre tracts; it was testified that the former was located by an actual survey beginning at a chestnut on the Tusquita Bald, in the Mason County line, as indicated by the description and the map; and it was admitted that there was evidence sufficient to go to the jury as to the location.

Defendant claimed to derive title from Olmsted through, first, a decree of the Superior Court of Mason County, North Carolina, in an equity action brought by one Swepson against Olmsted in the year 1882, resulting in a deed of conveyance, made pursuant to the decree and order of the court, by Kope Elias, Commissioner, to A. Rosenthal, dated October 28, 1882, and duly registered in Clay County October 17, 1890; secondly, a quitclaim deed from Olmsted and wife to Rosenthal, dated October 31, 1882, registered in Clay County November 12, 1906, quitclaiming all interest of the grantors in the lands described in the Kope Elias deed; and, thirdly, certain special proceedings in the Superior Court of Alamance County, North Carolina, taken by the executrix of Swepson in the year 1884 for the sale of Swepson's "equitable and legal real estate," which resulted in a deed made by order of the court from Swepson's executrix to Rufus Y. McAden, dated May 11, 1888, duly registered in Clay County June 28, in the same year. Both the Kope Elias deed and the deed from Swepson's executrix to McAden purport to convey some interest in the 16 grants of 640 acres each. Other deeds were introduced to show that whatever estate or interest was conveyed by the deeds specified had become vested in defendant.

Mr. Assistant Attorney General Knaebel, with whom *Mr. S. W. Williams* was on the brief, for the United States.

Mr. Marshall W. Bell and *Mr. James H. Merrimon* for defendant in error.

MR. JUSTICE PITNEY, after making the foregoing statement, delivered the opinion of the court.

In order to simplify matters, we will dispose at the outset of a point that was ruled by the Circuit Court of Appeals in favor of plaintiff in error. As tending to sustain the ruling of the trial judge in directing a verdict for defendant, it was and is insisted that the 640 acre grants which figure in defendant's chain of title have priority over the 5,000 acre grant to which the deeds in plaintiff's chain of title refer. It is said that the lands were entered under the Cherokee land law, Laws 1852, chap. 169; Code of 1883, §§ 2464, *et seq.*; that the 5,000 acre grant is invalid for non-compliance with certain formalities prescribed by the law, and that even if valid it is subordinate to the 16 grants of 640 acres each, because, as is said, grants of this nature have effect according to the dates of the respective land entries, and the 16 grants were based upon entries antedating that upon which the 5,000 acre grant rests. We do not stop to examine the statutes upon which this contention rests, because we agree with the Court of Appeals that it is quite immaterial whether the 5,000 acre grant, independently considered, was valid or invalid. It is admitted that the 16 grants cover the same land, and all the grants were made to the same grantee upon the same day. It results that, in one mode or another, Olmsted on that day acquired the title of the State of North Carolina to the 5,000 acres. His deed to Stevens described that tract by its metes and bounds, as well as by reference to the grant number. If that deed is otherwise valid as

against defendant it conveys his title to the tract thus described, whether that title was derived from the State through Grant No. 3110 or through the other 16 grants.

The principal controversy turns upon the probate and registration of the deed from Olmsted to Stevens. The trial court held that under the laws of North Carolina the registration of 1869 was invalid as notice or for any purpose, but admitted in evidence the registration of 1896. The direction of a verdict in favor of defendant was based upon the theory that because the deed from Kope Elias, Commissioner, to Rosenthal was registered prior to the registration in 1896 of the deed from Olmsted to Stevens, Rosenthal thereby acquired the legal title as a purchaser for value without notice, and that his rights and the rights of those claiming under him were not affected by the registration of the Olmsted and Stevens deeds in the year 1896. The Circuit Court of Appeals, apparently deeming that there was no distinction, so far as registration was concerned, between the status of the Olmsted-Stevens deed and that of the deed made by Stevens to the United States, considered the question with respect to the latter deed, and, finding that its registration prior to 1896 (erroneously assumed to have been made in Clay County in 1871), was not valid, and no title passed thereby, concluded that the same was true of the registration of the Olmsted-Stevens deed in Clay County in the year 1869. But it so happens that between the acknowledgment of the Olmsted deed in February, 1868, and the acknowledgment of the Stevens deed in March, 1869, the law of North Carolina was changed in a material respect; and, for this and other reasons that will appear, we deem it proper to consider the earlier deed first.

The deed from Olmsted to Stevens was dated and acknowledged February 7, 1868. At that time the provisions of law governing the acknowledgment, proof, and registration of deeds were those found in Rev. Code 1855,

chap. 37, "Deeds and Conveyances," and chap. 21, "Commissioners of Affidavits and Probate of Deeds." We set forth the material portions in the margin.[1]

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[1] REVISED CODE, 1855.

CHAPTER 37.

1. No conveyance for land shall be good and available in law, unless the same shall be acknowledged by the grantor, or proved on oath by one or more witnesses in the manner hereinafter directed, and registered in the county where the land shall lie, within two years after the date of the said deed; and all deeds so executed and registered shall be valid, and pass estates in land, without livery of seizin, attornment, or other ceremony whatever.

2. All deeds, . . . and other instruments of writing required or allowed to be registered, may be admitted to registration in the proper county, upon being acknowledged by the grantor, or proved on oath before one of the judges of the supreme or superior court, or in the county court of the county where the land or estate is situate, unless otherwise directed, or before the clerk of such court, or his deputy. *Provided*, that nothing herein contained shall be construed to allow the privy examination of *femes covert* to be taken otherwise, than by law is specially directed.

* * * * * * * *

4. When any person shall desire to have registered any such deed [if the grantor or subscribing witness be beyond the limits of the State] . . . the court of pleas and quarter sessions . . . may issue a commission . . . to a commissioner or commissioners, authorizing any one or more of them to take the acknowledgment of the parties, or the examination of any one of the subscribing witnesses thereto, or other due proof thereof; and also the examination of any *feme covert* party to the same; and the proceedings of the commissioners, so authorized, being returned to the court, the court may proceed to adjudge that such deed or other instrument of writing is duly acknowledged or proved, and that the said examination is in due form: and thereupon the same, with the said proceedings, shall be registered; and such registration shall have the same effect as if the proceedings had been in open court.

5. When any deed conveying lands in this State . . . shall have been executed by any person, and it may be desired to take the probate or acknowledgment thereof out of this State, but within the United States, and the same shall be personally acknowledged by the person executing the same . . . before some one of the judges of

There is no question that the Olmsted deed was duly and properly acknowledged before a North Carolina commissioner in the District of Columbia, and the acknowledgment duly certified by him; so that, under the law as it then stood, upon the presentation of the deed with the accompanying certificate to the court of pleas and quarter sessions of Clay County, or to one of the judges of the Supreme Court or of the Superior Courts of North Carolina, a fiat for its registration would have followed, as of course.

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supreme jurisdiction, or a judge of the courts of law of superior jurisdiction within the State, Territory, or district where the parties may be,—and if any of the parties shall be a *feme covert* and she shall be privily examined by such judge, whether she doth voluntarily assent thereto— . . . Or when such deed, . . . or other instrument as aforesaid shall be so acknowledged or proved, and the privy examination taken as aforesaid, before any commissioners appointed by the governor of this State, according to law, and duly certified by him, such deed . . . or other instrument, being exhibited in the court of pleas and quarter sessions of the county where the property is situate, or to one of the judges of the supreme court or of the superior courts of this State, *shall be ordered to be registered with the certificates thereto annexed; and the same being registered in the county wherein the property may be situate, pursuant to such order . . . shall be valid in law for the purpose intended thereby, and shall be received in evidence in any court without further proof.*

CHAPTER 21.

* * * * * * * *

2. The governor is hereby authorized to appoint and commission one or more commissioners in such of the States of the United States, or in the District of Columbia, or any of the territories, as he may deem expedient, who shall continue in office during the pleasure of the governor, and shall have authority to take the acknowledgment or proof of any deed, mortgage, or other conveyance of lands, tenements, or hereditaments lying in this State, and to take the private examination of married women, parties thereto, or any other writings to be used in this State. And such acknowledgment or proof, taken or made in the manner directed by the laws of this State, and certified by the commissioner, *shall have the same force and effect, for all purposes, as if the same had been made or taken before any competent authority in this State.*"

After the deed was acknowledged, but before it was registered, the change to which we have referred was produced by the adoption of the Code of Civil Procedure in the month of August, 1868. Of that Code, Title XIX applies to Probate Courts, and its second chapter relates to the Probate of Deeds.[1] It required that deeds conveying lands in the State "must be offered for probate, or a certified probate thereof must be exhibited before the Judge of Probate of the county, in which the real estate is situated," and it applied this to deeds acknowledged before North Carolina commissioners in other States or in the District of Columbia, at the same time requiring an adjudication that the deed was duly acknowledged, etc.

The query at once arises, whether this act can be fairly construed to apply to deeds previously executed and acknowledged in accordance with the requirements of the prior law. The Act is a Code of Civil Procedure, and § 429 prescribes the *mode* in which the probate of deeds shall be made and the certified probate thereof passed upon. There is nothing in this section, nor, so far as we

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[1] CODE OF CIVIL PROCEDURE, 1868.

PROBATE OF DEEDS.

§ 429. How made.

All deeds conveying lands in this State . . . must be offered for probate, or a certified probate thereof must be exhibited before the Judge of Probate of the county, in which the real estate is situated, in the manner following; . . . .

4. Where the acknowledgment or proof of any deed or other instrument is taken or made, in the manner directed by the laws of this State, before any commissioner of affidavits for the State of North Carolina, appointed by the Governor thereof, in any of the States or territories of the United States or in the District of Columbia; and where such acknowledgment or proof is certified by such commissioner, *the Judge of Probate, having jurisdiction, upon the same being exhibited to him, shall adjudge such deed or other instrument to be duly acknowledged or proved in the same manner as if made or taken before him.*

have observed, is there anything in the Act of which it forms a part, that attempts expressly to regulate or impose conditions upon the registration of deeds or other instruments. We are referred to no decision by the courts of North Carolina that makes the new procedure a condition precedent to registration of a deed previously made and acknowledged and thereafter registered within two years after its date, pursuant to Rev. Code 1855, chap. 37, § 1.

But we deem it unnecessary to pass upon the question here suggested, for reasons that will presently appear.

It will be observed that in the Code of 1855 a very different effect was given by § 5 of chapter 37 to a certificate of acknowledgment taken by one of the commissioners appointed by the Governor under Chapter 21, from the effect given to the proceedings of a commissioner or commissioners specially appointed under § 4 of chapter 37. Proceedings before a special commissioner, being returned to the court, simply formed the basis upon which the court might proceed to adjudge that the deed was duly acknowledged or proved. But an acknowledgment taken by a standing commissioner (an official commissioned by the Governor and holding office during his pleasure), being duly certified, was not to be reviewed judicially before being ordered to registration. So it was expressly held by the Supreme Court of North Carolina in *Johnson* v. *Lumber Co.* (1908), 147 N. Car. 249, 251. And see, to the same effect, *Cozad* v. *McAden*, 148 N. Car. 10, 12; *S. C.*, 150 N. Car. 206, 209, 210. That such was the law prior to the adoption of the Code of Civil Procedure was recognized by the Circuit Court of Appeals (202 Fed. Rep. 41).

The Code of 1855 did contemplate an order or fiat for registration, and there is no evidence that the Olmsted-Stevens deed, when registered in 1869, was accompanied by such an order, except the official certificate that it was "*duly* registered." But it has been in effect held that the statutory provision for such an order is direc-

tory, not mandatory; and that, if the deed be in fact registered after proper probate, the fiat becomes non-essential. *Holmes* v. *Marshall*, 72 N. Car. 37, 40; *Young* v. *Jackson*, 92 N. Car. 144, 147; *Darden* v. *Steamboat Co.*, 107 N. Car. 437, 445. The first two of these cases were distinguished in *Evans* v. *Etheridge*, 99 N. Car. 43, 47; but this case did not hold that the absence of the fiat for registry was fatal.

However, assuming the amendment of 1868 to have a retrospective effect, and to be so construed as to require the certificate of acknowledgment of the Olmsted-Stevens deed to be submitted to the adjudication of the Judge of Probate, and then to the approval of the proper court or judge, and an order for its registration to be made, as conditions precedent to registration, we have next to consider the effect of an act of the General Assembly of North Carolina, ratified January 27, 1870 (Laws 1869–1870, p. 69), and entitled "An Act concerning the probate and registration of deeds and other instruments." Its language is: "*That the probate of all deeds and other instruments required to be registered heretofore taken under laws existing prior to the adoption of the code of civil procedure, is hereby declared valid to all intents and purposes, and shall be admitted to registration as if the probate had been taken under existing laws.*" The form of expression indicates a legislative intent to validate probates theretofore taken in accordance with the requirements of the law as it existed before the Code, including probates thus taken subsequent to the ratification of the Code and before the validating act. (And see *Cozad* v. *McAden*, 148 N. Car. 10, 12, containing a *dictum* to that effect.) But we need not go so far, since it is not and cannot be questioned that the Act validates and admits to registration probates taken before the Code and in accordance with the law as it stood when they were taken. The Court of Appeals, referring to this Act and to a later curative

act ratified December 12, 1876 (Laws 1876–1877, p. 68), and considering their effect upon the registration of the two deeds under which plaintiff claims said (202 Fed. Rep. 48): "There is nothing contained in the foregoing that could be construed to relate to the defects alleged as respects the probate of these deeds. *In this instance there was no probate at all* [italics ours]. Therefore it cannot be said that this act, which undertakes to cure defective probates, can have any relation to instruments attempted to be registered in the manner these were. For that reason we do not think this act applies to the case at bar."

Confining ourselves to the effect of the 1870 act upon the Olmsted-Stevens deed, in our opinion the court erred in holding there was "no probate" of the deed, within the meaning of the curative act.

It is possible that, after the Code of Civil Procedure extended to other cases the requirement of adjudication which before that time had applied only with respect to acknowledgments and proofs taken before specially appointed commissioners, the word "probate" may have come to be used with reference to the act of judicial approval by the Judge of Probate, rather than to the certificate of acknowledgment or proof submitted for such approval.

But the act of 1870 employed the term "probate" with respect to proceedings taken under laws that existed prior to the adoption of the Code of Civil Procedure, and we must look to the prior law in order to determine in what sense the word was used in the curative act. In general usage the term is applied rather to wills than to deeds, and signifies official proof, sometimes *ex parte*, before a judicial or quasi-judicial officer or tribunal. In North Carolina, from an early day, it has been applied to the proof or acknowledgment required to be made of deeds and other instruments in writing as a

condition precedent to registration. In early times, probate was made before the county courts. Laws 1807, ch. 16, p. 10; Laws 1814, ch. 11, p. 12; ch. 19, p. 14. Afterwards, deeds were allowed to be acknowledged or proved "either before one of the judges of the supreme court or of the superior court, or in the court of the county where the land lieth." Rev. Stat. 1837, ch. 37, § 1. And in the Revised Code of 1855, ch. 37, § 2, the clerk of the county court and his deputy were included among those who might take acknowledgments and proofs within the State. Such acknowledgment or proof was frequently referred to as "probate." Thus, we find that Chapter 21 of Rev. Code 1855, under which the commissioner who took the acknowledgment in question was appointed, has for its title "Commissioners of Affidavits and *Probate of Deeds.*" The index at the head of the chapter and the index-note in the margin read: "Governor may appoint commissioners to take and certify *probate* of deeds &c. in other States." And so with respect to Chapter 37: the word "probate" is employed in the head and marginal indexes with respect to §§ 4 and 5, and is also employed in the body of § 5. In short, the word appears to have been commonly employed, prior to the Code of Civil Procedure, as referring to the proof or acknowledgment of deeds as a condition precedent to registration, irrespective of whether it was taken before a court or a commissioner. And it was so employed in judicial opinions. *McKinnon* v. *McLean* (1836), 19 N. Car. (2 Dev. & Bat.) 79, 83–86; *Carrier* v. *Hampton* (1850), 33 N. Car. (11 Ire.) 307, 310; *Freeman* v. *Hatley* (1855), 48 N. Car. (3 Jon.) 115, 117–119; *Williams* v. *Griffin* (1856), 49 N. Car. (4 Jon.) 31, 32; *Johnson* v. *Pendergrass* (1857), 49 N. Car. (4 Jon.) 479, 480; *Simmons* v. *Gholson* (1858), 50 N. Car. (5 Jon.) 401, 403.

Indeed, this meaning of the term "probate" is recognized in § 429 of the Code of Civil Procedure itself, for

this requires that deeds "must be offered for probate, *or a certified probate thereof must be exhibited* before the Judge of Probate;" and, in going on to specify the manner of doing this, it treats the certificate of acknowledgment or proof as the certified probate thus required to be exhibited.

To construe the act of 1870 as applying only to proceedings such as were first prescribed by the Code of Civil Procedure would leave it nearly or quite devoid of force. The things to be validated were probates taken under laws that existed prior to the adoption of that Code. We cannot limit this to proceedings that would be deemed probate under the test adopted by the Code itself, for these would require no validation. And in *Cozad* v. *McAden*, 148 N. Car. 10, 12, the Supreme Court of North Carolina, *arguendo*, construed the act of 1870 as dispensing with the adjudication by the Judge of Probate and "making probates in the previous manner valid up to 27 January, 1870."

We deem it equally clear that the effect of the curative act is not confined to deeds that remained unregistered. With regard to these, it contained a legislative fiat that they should be admitted to registration. But, certainly, it was not intended that similar deeds already registered should stand on a less favorable footing. On the contrary, the intent is that all deeds probated in such manner that under the previous laws they were entitled to be admitted to registration, shall be validated "to all intents and purposes." The result is that if already registered when the act of 1870 was ratified the legislative fiat for registration, which took the place of the judicial fiat, applied to them *nunc pro tunc*. Considering the change in the law that had been produced by the then recent act of 1868, and the confusion naturally attributable to it, we think the construction we have placed upon the act of 1870 correctly expresses the legislative purpose.

The result of this is that, at least from the ratification of the curative act, the Olmsted-Stevens deed became "good and available in law," and notice to all the world, including those under whom defendant claims.

The Court of Appeals (202 Fed. Rep. 42) said: "It was not contended by counsel for the plaintiff in the court below that the attempted registration of the deed from Olmsted to Stevens was sufficient to divest Olmsted of the legal title." If by this it was meant that counsel did not assert whatever rights plaintiff had under the registration of 1869, or waived any rights so asserted, or did not fairly except to the adverse rulings of the trial court upon the question, we cannot agree. The first exception (taken when the Olmsted deed was offered and the court excluded from evidence the registration of 1869) shows that, in response to an inquiry from the court, "Upon which registration are you offering the deed?" plaintiff's counsel answered, "Both." And in the ensuing colloquy the court stated the respective positions of opposing counsel as follows: "He [meaning plaintiff's counsel] says that I am offering a deed registered in 1868 [meaning 1869], and also one which we say was registered in 1896. Defendant's counsel says this deed registered in 1868 [1869] cannot be accepted, as it is not legally registered and is void." And plaintiff's exception was: "To the ruling of the court excluding the record offered in evidence of the registration of the deed in 1869." It is true that after the court had ruled this point against plaintiff, and after the introduction of defendant's evidence, plaintiff again offered the record of the registration of 1869, "not for the purpose of showing title [that purpose had already been overruled] but as evidence of notice to the purchasers, simply as a circumstance giving notice." This did not amount to a waiver of the point previously reserved. Besides, at the close of all the evidence, plaintiff asked for certain instructions based in effect upon the

1869 registration, and took exceptions to the action of the trial judge in refusing these and in instructing a verdict for defendant. The question we have passed on was clearly reserved by the exceptions.

The deed from Olmsted to Stevens, its probate, and its registration in Clay County in 1869, having been validated "to all intents and purposes" by the act of 1870—long prior to the derivation of defendant's title from Olmsted—we must next consider the deed from Stevens to the United States. For, of course, plaintiff must succeed on the strength of its own title, and the latter deed is an essential link in the chain.

This deed stands upon a different footing from the Olmsted deed, for it was both made and acknowledged after the ratification of the Code of Civil Procedure in 1868, and it was not registered in Clay County within two years after its date, nor until sometime in 1896, being then accompanied with certificates of probate that complied with the provisions of the Code of Civil Procedure. It was acknowledged before the act of January 27, 1870; but, supposing that Act to be applicable to deeds acknowledged after the adoption of the Code of Civil Procedure, and in a mode not conforming to its provisions but conforming to the provisions of the previous law, it cannot avail plaintiff because it did not dispense with the necessity of registration within two years from the date of the deed, imposed by Rev. Code, 1855, chap. 37, § 1.

Nor do we think the deed comes within the act of December 12, 1876, for it was not registered within two years after the ratification of that Act, as by its terms was required.

As we have already seen, Rev. Code 1855, ch. 37, § 1, declared that no conveyance of land should be "available in law" unless registered in the county where the land lay, within two years after its date. Prior to the Connor Act of 1885, presently to be mentioned, it was settled law in

North Carolina that an unregistered deed could not be introduced in evidence and did not create a perfect legal title. It was sometimes treated as an executory contract between the parties, sometimes as conferring an equitable title, or an incomplete legal title; the difference is immaterial for present purposes. Unless registered within the two years allowed by the Code of 1855, or as allowed by statutes extending the time, of which there were many but none that applies here, the deed was not "available in law." On the other hand, when recorded within the time allowed by any act of the legislature, it related back to the time of its execution, and conveyed a complete legal title as of that date, which was paramount even to the title acquired by a purchaser for value from the same grantor without notice of the unregistered deed. *Phifer* v. *Barnhart* (1883), 88 N. Car. 333, 338, and cases cited; *Austin* v. *King* (1884), 91 N. Car. 286, 289; *Laton* v. *Crowell* (1904), 136 N. Car. 377, 379.

But by § 1 of the Connor Act—chap. 147, Pub. Laws 1885—§ 1245 of the Code of 1883 was struck out (this had taken the place of Rev. Code 1855, chap. 37, § 1), and in its place the following was inserted:

"No conveyance of land . . . shall be valid to pass any property, as against creditors or purchasers, for a valuable consideration from the donor, bargainor or lessor, but from the registration thereof within the county where the land lieth: *Provided however*, that the provisions of this act shall not apply to . . . deeds already executed, until the first day of January, one thousand eight hundred and eighty-six: *Provided further*, that no purchase from any such donor, bargainor or lessor shall avail or pass title as against any unregistered deed executed prior to the first day of December, one thousand eight hundred and eighty-five, when the person or persons holding or claiming under such unregistered deed shall be in the actual possession and enjoyment of such land,

either in person or by his, her or their tenants, at the time of the execution of such second deed, or when the person or persons claiming under or taking such second deed, had at the time of taking or purchasing under such deed actual or constructive notice of such unregistered deed, or the claim of the person or persons holding or claiming thereunder."

By § 2, provision was made for registering deeds executed prior to the year 1855 upon special proof. And, by § 3, all other deeds, having been acknowledged or proven in the manner prescribed by law, were permitted to be registered, "and all deeds so executed and registered shall be valid, and pass title and estates without livery of seizin, attornment or other ceremony whatever."

Under this Act, as has been uniformly held by the Supreme Court of the State, there is no limitation as to the time when the deed shall be registered; the Act simply provides that the deed shall not be valid against creditors or purchasers for value except from registration. *Hallyburton* v. *Slagle*, 130 N. Car. 482, 484; *Cozad* v. *McAden*, 148 N. Car. 10, 11; *Brown* v. *Hutchinson*, 155 N. Car. 205, 208.

Therefore, the registration of the deed from Stevens to the United States in Clay County in 1896 made it valid to pass title as between the parties and for all purposes, unless its effect is limited by what is contained in § 1 of the same Act. But it will be observed that the primary design of that section is to protect "creditors or purchasers, for a valuable consideration *from the donor, bargainor or lessor*" in the unregistered instrument—those, in short, who may be presumed to have relied upon his apparent ownership of the land. And, by the terms of the second proviso, "no purchase from any *such* donor, bargainor or lessor shall avail or pass title as against any unregistered deed [such as the Stevens deed] . . . when the person or persons claiming under or taking *such second deed*, had

at the time of taking or purchasing under such deed actual or constructive notice of such unregistered deed, or the claim of the person or persons holding or claiming thereunder." Stevens made no "second deed." And since defendant and its predecessors in title did not claim under him, but claimed under Olmsted—of whose deed to Stevens they had constructive notice, by reason of its registration in 1869 and the curative act of 1870—it follows that the registration of the Stevens deed in 1896 makes it good as against defendant.

It thus appears that plaintiff's paper title as registered must prevail over that of defendant. This renders it unnecessary to consider whether, aside from the registration of the Olmsted deed in 1869, defendant and those under whom it claims were purchasers without notice, within the meaning of the second proviso of § 1 of the Connor Act. Upon this question, therefore, we express no opinion.

Judgment reversed, and the cause remanded for further proceedings in accordance with this opinion.

MR. JUSTICE DAY and MR. JUSTICE HUGHES concur in the result, because, while agreeing with the Circuit Court of Appeals as to its disposition of the case otherwise, they think there was testimony tending to show that Rosenthal was not a purchaser for value, and that question should have been submitted to the jury under proper instructions, since, unless Rosenthal was such purchaser within the terms of the Connor Act, plaintiff was entitled to recover.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.